Are Last Chance Agreements Enforceable?

Employers and Unions often use a Last Chance Agreement (“LCA”) in circumstances where an employee would normally be terminated. Such agreements are generally used in cases of alcoholism, substance abuse or innocent absenteeism. The LCA will specify what an employee must do to preserve their employment, and what the consequences will be if they fail to comply.

Unfortunately, even if an employee breaches a condition of the LCA and is terminated, it is almost certain that the Union will refer the matter to arbitration. At this point, an employer will be relying on an arbitrator to enforce the validity of the LCA and uphold the discharge. Historically, arbitrators have held that LCAs are valid and enforceable.

Depending on the terms of the LCA, parties can limit an arbitrator to reviewing the evidence and determining if the terms have been breached. In other words, the scope of the arbitrator’s review would not include any opportunity to consider mitigating circumstances. If the terms are drafted carefully, an arbitrator will be reluctant to modify a discharge penalty.

However, notwithstanding the general reluctance of arbitrators to interfere with a LCA, there are occasions where the LCA will be defeated, particularly where the Human Rights Code (the “Code”) has been violated. For instance, the Code prohibits discrimination on the basis of “handicap”. Since most LCAs are in response to alcoholism or innocent absenteeism from a chronic medical condition, they are discriminatory. LCAs are discriminatory
because an employee is treated differently because of his or her disability.

The relationship between the Code and the LCA must be thoroughly scrutinized to ensure that it can be enforced. If the LCA is rooted in an identifiable “handicap”, an employer must be capable of demonstrating that the employee cannot perform the essential duties of the position despite being accommodated to the point of undue hardship.

An employer must consider the following questions when using LCAs:

1. Are the LCA conditions logically connected to the performance of the employee’s position?

2. Has the LCA been adopted in good faith by the parties to assist the employee and employer? and

3. Is the LCA reasonably necessary to accomplish the employer’s objectives because the employee cannot be accommodated without undue hardship?

There have been several recent cases where LCAs have not been upheld. In a case that was appealed to the Divisional Court, an employee was found not to have breached the LCA. The LCA provided that his attendance would be reviewed every six months for two years. If during that time his attendance was greater than the departmental average, he would be terminated.

The employee’s problems were attributed to “obsessive compulsive disorder”, which is a disability under the Code. After being reinstated under the LCA, he was subsequently absent due to a blood pressure condition related to his disability. He had now breached the LCA, and was discharged. The Court held that in the absence of being able to establish that his disability related absences could not be accommodated to the point of undue hardship, an infringement of the Code could not be justified.

Some cases have suggested that even if the absences are unrelated to the underlying “disability” an employer may still violate the Code, especially if the unrelated absence which triggered the LCA is another disability. This can be
particularly difficult for an employer who is faced with an employee who begins to miss work because of a non-work related injury. The absences may trigger the LCA, but unless the employer can demonstrate that accommodation to the point of undue hardship is not possible the employer will not be able to rely on the LCA. A practical example would be where an employee is suffering from some “temporary illness”, which is still considered a “handicap” under the Code.

The relationship between the Code and LCAs is not a static body of law. Consequently, great caution and care must be exercised in drafting and using such agreements. The Code will supersede any condition in the LCA, so knowing how and when to apply the LCA is crucial. Inevitably, Unions are compelled to arbitrate the termination of an employee (even under the terms of a LCA), because of their duty of fair representation. Consequently, an employer should expect that the LCA may be challenged at anytime.

If you currently have LCAs in force, you may want to consider a review of how you are managing them. Please call if we can assist you.

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