Employee Discipline and Fairness

COMM 203 Flex at the Sauder School of Business, University of British Columbia
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All organizations experience turnover among their employees. There are two types of turnover:

1. Voluntary turnover that is initiated by the employee when the employer would generally like the employee to stay.
2. Involuntary turnover that is initiated by the employer when the employee would generally like to stay in the organization.

Voluntary turnover is due to many reasons, some of which have been discussed earlier. But voluntary turnover rates fluctuate over time in relation to the extent to which alternative job opportunities are available in the market.

Voluntary Turnover Rates (average percentage of employees)

This is shown in this diagram of average, annual voluntary turnover rates in Canada. The rates peaked in 2007-08 when the economy was strong, unemployment rates were low, and therefore alternative jobs were readily available. However, this all changed dramatically starting in late 2008 and 2009 when financial markets collapsed and the Canadian economy went into a recession. Voluntary turnover rates were much lower in 2009-10. But as the economy recovered, rates began to rise again to the range of 7-8% which is the longer run average for voluntary turnover.

Organizations should monitor voluntary turnover and try to determine why employees are leaving. This can be done through exit interviews, or exit surveys, of employees who leave. Often employees leave for personal reasons, such as moving to another city to be closer to their family, or they want employment with a shorter commute time. There is little that employers can do about this voluntary turnover for personal reasons. But, if many employees who leave say it is due to workplace issues, such as lack of advancement opportunities, too much job stress, or due to low pay or poor benefits relative to similar jobs in the market, then the organization can make changes to try to reduce their voluntary turnover rate. Remember that hiring qualified replacements can be a very long and expensive process, so finding ways to reduce voluntary turnover can be very cost effective for the organization.

Involuntary turnover, or employee termination, is more complicated, and this aspect of turnover is also regulated by employment standards legislation, the courts, collective agreements and arbitrators. There are some distinct differences in how involuntary turnover is handled for unionized versus nonunionized employees, and I will note these differences below. In general, unionized employees have much greater protection against involuntary turnover than nonunion employees.

**THERE ARE TWO BROAD TYPES OF INVOLUNTARY TURNOVER BASED ON THE REASONS FOR THE TERMINATION(S):**

1. **Economic terminations** are when the employer no longer needs the employee(s). This may be due to slumping business, technological changes or other reasons, but the positions and employees are simply no longer needed. This is often referred to as “layoffs” or “downsizing”. These terminations are through **no fault of the employees**, but due to reductions in employment demand by the employer.

2. **Disciplinary terminations** are due to the employee’s behavior. Either their performance was unsatisfactory, or they engaged in some misconduct, such as stealing from the employer, or assaulting another employee or their supervisor. These terminations are often referred to as “firing” an employee, “disciplinary termination”, “dismissal” or “discharge”.

All organizations should have a formal disciplinary process. Disciplinary procedures are always included in any collective agreement for unionized employees. Three purposes of discipline procedures include:

1. to be remedial and correct inappropriate behavior
2. to be a deterrent through punishment, and
3. to dismiss employees if warranted.

**EMPLOYEE DISCIPLINE PROCEDURES REQUIRE THREE FOUNDATIONS OF FAIRNESS:**
1. Rules and regulations need to be clearly established and communicated to employees. It is not fair to discipline employees for violation of a rule they did not know. Some things are assumed as common knowledge in all workplaces, however, such as coming to work on time, or not stealing from your employer. But policies and rules of the organization must be communicated to employees before they can be disciplined for violations.

2. A system of progressive discipline. That is, first offences should receive a minor penalty, such as an oral warning, but discipline should be more severe for repeated offences, eventually increasing to a suspension and finally dismissal. Again, there are some exceptions for very serious offences. For example, assaulting your supervisor would usually be grounds for dismissal on the first offence.

3. The discipline process should include an appeal process. If the employee feels they have been unfairly or wrongly disciplined, they should have the option to appeal for a review. Unionized workers appeal through the grievance procedure. Many nonunion organizations do not have an internal disciplinary appeal process, but principles of fairness indicate they should.

For nonunion workers, discipline and terminations are covered by “common law”, and any written or “implied” individual contracts of employment. A key feature of common law is the “employment at will doctrine” that applies if there is no contract of employment, and says the employee or employer may end the employment relationship at any time. Limitations have been place on this doctrine, however. For economic terminations or any termination that is not for “just cause”, employment standards legislation and the courts require appropriate advance notice, or “pay in lieu of notice”. For disciplinary terminations, no notice is required if “just cause” is established by the employer.

**WHAT IS JUST CAUSE?**

1. If an employee is terminated for cause, the burden of proof in establishing just cause is on the employer. They must have records or evidence to prove that just cause is present in each case.

2. The employee should have had advance warning, or reasonably should have known the behavior was an infraction that would lead to discipline.
3. There must have been “due process”, that is, a fair, objective and unbiased investigation before any discipline decision is made.

For many serious infractions, just cause may be established with only one incident. These serious infractions would include theft, fraud, or other dishonesty, harassment or assault of coworkers or supervisors, willful violation of company rules and practices, and other serious infractions. For unsatisfactory performance or other minor misconduct such as absenteeism, tardiness, and minor rule violations, to establish just cause there must be repeated violations and the employer must follow the foundations of fairness and progressive discipline already discussed. For just cause due to poor performance, the employee must be given a reasonable length of time and assistance to try to meet a clearly specified level of performance. If the employee still cannot meet that standard, then they may be dismissed for just cause due to poor performance.

For nonunion workers, termination disputes are resolved in the courts, but very few terminated employees ever sue their former employers in court for “wrongful dismissal”. In the case of economic or “at will” terminations, the only issue the court will address is whether the employee received appropriate notice or pay in lieu of notice. In most “wrongful dismissal” cases in the courts, the employee was dismissed allegedly for “just cause” but the employee sues arguing there was no just cause for dismissal and they should have received pay in lieu of notice. Essentially they are suing their former employer for the pay in lieu of notice. If the court rules there was just cause, then the case is dismissed by the court. But if it is determined there was no just cause for dismissal, the court will then determine what the appropriate period of notice should have been. There are no clear rules on how this is done, but often the courts impose a much longer notice period than is required by employment standards legislation. A general guide for how the courts may decide notice is one month of notice for each year the employee worked with the employer. So, an employee with 24 years of service with the employer who was wrongly dismissed may receive 2 years of pay as their pay in lieu of notice. Employers may try to argue the dismissal was due to just cause so they can avoid paying for this period of notice. The courts will not reinstate wrongfully dismissed employees to their job. Wrongfully dismissed employees cannot get their former job back. Under the employment at will doctrine, the best they can achieve is pay in lieu of notice from their former employer.

For unionized workers all terminations are covered by the collective agreement. Any disputes about terminations are handled by the grievance procedure, and if not resolved by the employer and union, go to grievance arbitration for a final and binding decision. Unionized employees cannot sue their former employer in court for wrongful dismissal. For economic layoffs, the collective agreement may specify conditions under which layoffs can occur and which employees will be laid off, usually by reverse seniority. The collective agreement may specify the required notice period or severance pay laid off employees should receive.

Any discipline, including disciplinary discharges must be for just cause. How arbitrators handle these cases for unionized employees is quite different from how the courts handle cases for nonunion employees. Arbitrators will follow three steps or questions (based on William Scott Case (BCLRB, 1977):

1. Is there just cause for some form of discipline?
   a. If not, overturn the discipline
b. If so, then go to step 2

2. Was the disciplinary action appropriate for the severity of the offence?
   a. If so, let the discipline stand
   b. If not, go to step 3

3. What lesser penalty should be substituted?

If the arbitrator determines there was no just cause for discharge under 1-a, the discharged employee is often reinstated to their former job and given full back pay for the time they have been off work. If the arbitrator determines the employee deserved some discipline but the discipline imposed, such as discharge, is too severe, they will reinstate the employee to their former job but impose some lesser more appropriate discipline, such as a suspension.

There is another distinction to be made among terminations due to the employee’s behavior:

1. Culpable behavior is employee conduct that is blameworthy or has occurred through intentional actions. This is behavior that is within the employee’s control. Examples include theft, assault, insubordination, intentional safety violations, or absenteeism for unacceptable reasons, such as going fishing, or going shopping, but calling in sick.

2. Non-culpable behavior is unacceptable employee behavior that is not the fault of the employee. One example is absenteeism due to a chronic illness. The employer has the right to require the employee to come to work and if a long-term illness prevents that, this may be grounds for dismissal. Another example is chronic tardiness due to work-family conflicts. If an employee is frequently late, for example if it is impossible to get to work on time after dropping a child off at daycare as soon as the daycare is open and then commuting to work. The employer has the right to require the employee to be at work on time, and if that is not possible then the employee may be terminated. In both examples, the termination is due to the employee’s behavior, that is either being frequently absent or late for work, but the employee is not “culpable”, it is not their fault.

It is much more difficult to dismiss an employee for non-culpable behavior than for culpable behavior. For non-culpable behavior, the employer must be diligent in communicating expectations to the employee and must work with the employee to attempt to correct the problem. Only if this process fails can an employee be dismissed for non-culpable behavior problems.

As noted above, the “employment at will doctrine” does not apply when there is a contract of employment, and this includes a collective agreement. Consequently, it is much more difficult for unionized employers to dismiss employees, but conversely, unionized employees have much greater protections against unfair discipline and dismissal than nonunion employees.