PROGRESSIVE DISCIPLINE IN AUSTRALIAN EMPLOYMENT RELATIONS

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This paper uses 78 arbitration case decisions of the Australian Industrial Relations Commission (AIRC) covering a 4-year period between 1997 and 2000. The paper covers the concept of progressive discipline and explores arbitrators' (Commissioners of AIRC) perception of the the system of progressive discipline administered by employers prior to dismissal of employees through the observations made by arbitrators in arriving at their decisions. The paper also covers the legislative requirements in the context of unfair dismissals and its connection to proper administration of progressive discipline by employers prior to dismissing employees. There is a dearth of research in this area in Australia and it the hope of the author that this paper will shed some light in this respect. It could also form the basis for identifying contemporary issues in administering progressive discipline which in turn may form the basis for future research in this area. In any event, the findings in this paper will prove useful to all those involved in the realm of employment relations.

Introduction

Due to the exploratory nature of this inquiry, the analysis of progressive discipline in this paper is by no means an in-depth examination of this subject matter. The aim of this inquiry is to review the different dimensions with regard to the use of discipline in the different organisations and to draw some conclusions based on the observations made by the arbitrators (Commissioners of the AIRC). This inquiry can become a platform for future research into this subject matter and developing progressive discipline models appropriate for present and future workplaces.

In this paper, the findings on the system of progressive discipline applied by employers are discussed in relation to the literature review. The paper starts with an overview of the literature on concepts of progressive discipline, after which an analysis of the observations made by the arbitrators (Commissioners) of the Australian Industrial Relations Commission (AIRC) covering the application and purpose of the progressive discipline is set out. Finally, the paper compares the congruence between theory and the application of progressive discipline in real life situations by employers. The paper concludes by highlighting the current issues and the need to further research and develop new progressive discipline models for the information age.

The Progressive Discipline Model

Progressive discipline is a process for dealing with job-related behaviour that does not meet performance standards that are set by the employer. The main aim of progressive discipline is to assist an employee with lifting performance by giving the feedback and support to correct the problems encountered. Termination of employment resulting the inadequate progressive discipline endeavours of an employer may be deemed an unfair dismissal under Australian federal legislation.

The word "progressive" in this form of discipline denotes the fact that the penalties get progressively heavier as an employee continues not to meet the expectations of the employer,

e.g. fails to attend regularly, fails to perform properly or fails to behave acceptably in accordance with company policy (Kleiner and Pesulima, 1999:187). The initial goal is to improve performance and not to punish the employee for his/her shortcomings. The employer's actions in carrying out progressive discipline could include oral and written warnings, suspensions, or probation, depending on the nature of the offences and policies of the employer (Kleiner and Dhanoa, 1998:525-7). However, after the employee is given a reasonable opportunity to improve his/her performance, if there is no progress, then the consequences become more serious and ultimately lead to termination (Martin, 1990:28).

The progressive discipline model was first developed in the United States of America in the 1930s in response to unions' demand that companies eliminate summary terminations and develop a progressive system of penalties that would provide a worker with a protection against losing his/her job without first being fully aware that his/her job was at risk (Guffey and Helms, 2001: 111). The National Labor Relations Act (NLRA) of 1935 was introduced requiring that discipline and discharge be based on 'just cause' (Guffey and Helms, 2001: 112). Since the 1930s, both public and private organisations in the U.S.A. have settled on a common system to handle progressive discipline (Grote, 2001: 52). This practice has since become prevalent in the rest of the western world. Progressive discipline follows a four-step progression: an oral warning, a written warning, suspension, and dismissal (Guffey and Helms, 2001: 112).

According to Guffey and Helms (2001: 112), the four progressive steps are used to address identical offences committed by an employee and to fulfil corrective-training purposes. Guffey and Helms (2001:13) recommend the following:

- Step One - managers keep notes of what transpired during this initial meeting;
- Step Two – issue a written warning, is more serious and official. It summarizes the previous oral attempts. The written feedback is discussed with the employee and then placed in the employee's personnel file;
- Step Three – leads to suspension. The purpose of this layoff without pay is to impress on the employee the seriousness of the offence and the necessity of change; and

- The final step – leads to termination. Unlike the previous steps, termination is not a corrective measure. Dismissal is used only when the previous three steps have failed to help the employee change or the offence is of a highly serious nature.

According to Bernadi (1997:15), the disciplinary measure that is chosen should be tied to the offence rather than the employee. In this way, he says the disciplinary measures will be more consistent and are less likely to give rise to claims of favouritism or discrimination. Bernadi (1997:16) recommends that before deciding the level of discipline to impose, the employer should consider the following:

- the seriousness of the offence;
- the employee's previous record of incidents (which must have been brought to his or her attention);
- condonation, i.e. if the employer has previously condoned the employee's misconduct, they cannot rely on it to support a higher level of discipline;
- the employee's understanding of the violated policy ;
- provocation, i.e. if the employee was provoked, you may want to impose a lower level of discipline ;
- whether there is a credibility dispute;
- whether the person investigating the incident has firsthand knowledge of the facts and has thoroughly investigated the incident, including speaking to witnesses;
- whether the employer can prove the facts surrounding the incident ; and
- In addition, the employer should review the following documents:
    - ❖ performance evaluations
    - ❖ warning notices
    - ❖ personnel policies or work rules
    - ❖ witness statements and interview notes
    - ❖ other relevant documents including written complaints or statements, accident reports, work records, overtime records, timecards, safety inspections, etc.

Falcone (2000:3-4) describes four rules of workplace 'due process' that must be observed in dispensing progressive discipline:

1. The employee needs to know what the problem is;
2. The employee needs to know what he or she must do to fix the problem;
3. The employee needs to have a reasonable period of time in which to fix the problem; and
4. The employee needs to understand the consequences of inaction.

Further, Falcone (ibid) states that many managers fail to understand the fourth rule and this is where managers need the most training.

The best way to avoid problems at the time of an employee's dismissal is to ensure that an employment contract, policy manual and progressive discipline program are in place within the organisation (Scholz, 2001: 9). Having an effective progressive disciplinary program in place contributes significantly to the creation of a set of conditions which promotes high levels of morale in an organisation's most valued employees as this group is attracted to, and wants to work for, a competent employer (Anderson and Pulich: 2001:2).

In Australia, under section 170CG(3) of the WR Act, for a dismissal to be fair there must be a valid reason. The valid reason is similar to just cause principles under common law. Section 170 CG(3) specific requirements are:

(a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service;

(b) whether the employee was notified of that reason; and
(c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and

(d) if the termination related to unsatisfactory performance by the employee, whether the employee had been warned about the unsatisfactory performance before the termination; and

(e) any other matters that the Commission considers relevant.

However, the arbitrator is required not only to have regard to statutory considerations in section 170CG(3) of the WR Act but also in the context of affording "a fair go all round" (section 170 CA). As noted in Windsor Smith and Liu and others (1997), none of the statutory considerations is, in itself, determinative.

Generally, section 170 CG(3)(d) may be breached if the employee had not been warned and given time to improve and also, if the employee was not given appropriate training. Counselling and warnings must be provided to employees who are under-performing or not behaving in accordance with employer's rules (James v. Waltham Cross Urban District Council, 1973 cited in McGlyne, 1979:221). The employer will be in a better position to defend a termination of an employee if appropriate counselling and warnings have been provided and properly documented. Arbitrators place a great deal of importance on the notion of procedural fairness. Provision of counselling and warnings to the under-performing employee will normally be considered in favour of the employer in meeting the requirements of procedural fairness (McPhail v. Gibson, 1977 cited in McGlyne, 1979:224).

It is in the above context that progressive discipline becomes relevant to both employers and employees under Australian federal legislation. In other words, poor progressive disciplining by an employer could lead to a termination being construed as unfair dismissal of an employee.

Methodology

This paper is a by-product of a larger study of unfair dismissals under the Workplace Relations Act 1996 (WR Act). Data for empirical analysis was collected from unfair dismissal case decisions rendered by the AIRC. These cases on unfair dismissals were obtained from the on-line AustLII Databases. This site on the Internet is provided by the Australian Legal Information Institute (AustLII) Federal Government of Australia (URL:http://www.austlii.edu.au/databases.html) and provides a free database of cases determined by the AIRC amongst others.

Decisions dealing solely with the preliminary objections regarding the AIRC's jurisdiction to hear the case or extension of time applications was excluded from the study. Such jurisdictional issues include disputes as to whether complainants met the eligibility requirements of the statutory protection.

There were a total of 684 cases of arbitration decisions available as the total population for this study. Initially, the whole population of cases was grouped into different industry type in accordance with the industry classification of the Australian and New Zealand Standard Industrial Classification (ANZSIC). There are 17 industries listed by ANZIC. This listing is available on line through the ANZIC web site:
(http:www.abs.gov.au/Ausstats/abs@nst/Lookup/NT00014E8A).

The next step involved ensuring that there was a level of randomness in selecting samples of the 17 industries. With this aim, every second case listed in each industry grouping was selected for analysis. In other words, 50 per cent of all cases in each industry grouping was selected for analysis. During the course of that study information by way of observations made by arbitrators on the employers system of progressive discipline was collected. In total, there were 78 cases out of the total of 342 cases where progressive discipline was an issue. This paper presents findings in relation to those 78 cases involving progressive discipline.

Key Findings On Progressive Discipline

Table 1 - Occupation

(n = 78 cases)

Employee's Occupation type	Frequency	%
adminstation/managerial	3	3.9
clerical	9	11.5
professional/technical	5	6.4
sales	16	20.5
skilled	35	44.9
unskilled	10	12.8
total	78	100.0

Table 1 shows the breakdown by employee profession of the number of cases involving progressive discipline incorporating warnings. Skilled workers are by far the largest group subjected to discipline. Of the total of 78 cases, nearly 45% or 35 cases belong to this group. The other significant profession is 'Sales' which is showing about 21% (16 cases) of the total. 'Administration and Managerial' shows only about 4% (3 cases) of the total.

Table 2 – Industry Classification

(n=78 cases)

Industry	Frequency	%
Accommodation & Restaurants	6	7.7
Communications	5	6.4
Construction	3	3.8
Culture and Recreation	6	7.7
Education	2	2.6
Finance & Insurance	2	2.6
Govt. & Defence	1	1.3
Health	2	2.6
Manufacturing	14	17.9
Mining	8	10.3
Property & Business Services	11	14.1
Retail	8	10.3
Transport & Storage	6	7.7
Wholesale	4	5.1
Total	78	100%

Table 2 shows the distribution of the 78 discipline cases within the different industries to which employers belonged. Manufacturing, Mining, Property and Business Services, and Retail had double-digit percentages, accounting for about 53 % (41 cases) of the discipline cases jointly. It might be worth mentioning in passing that about 49 % (167 cases) of the cases selected for the main study (unfair dismissals) were in fact sitting within those four industries, that is,

Manufacturing, Mining, Property and Business Services, and Retail. Therefore, it comes as no surprise that the majority of discipline cases came from these industries as well. However, the closeness of the two proportions (53% and 49%) is not an indicator of any meaningful statistical correlation.

Table 3 – Easier for Arbitrator to Conclude

(n=78)

Easier for arbitrator to conclude	Frequency	%
Yes	75	96.2
No	3	3.8
Total	78	100%

Table 3 above shows that in over 96% (75 cases) of the cases where employer applied progressive discipline, arbitrators found it easier to arrive at a conclusion as to whether the dismissal was unfair or otherwise. In other words, the arbitrator was able to assess the system of discipline used and its relative fairness to the employee given the different and sometimes unique circumstances of each case.

Table 4 – Employee Offences

(n=78)

Type of Employee Offences	Frequency	%
absent	2	2.6
absent without permission	6	7.7
alcohol/drugs/gambling	2	2.6
attitude problems	6	7.7
dishonest	5	6.4
insubordination	4	5.1
negligent	2	2.6
other – assault on staff	1	1.3
lack of performance	48	61.5
breaking rules	2	2.6
total	78	100%

Table 4 displays the offences for which employees were disciplined. The highest number (nearly 62 %) related to inadequate or lack of performance. The other offences range from 1.3 % to 7.7% and therefore are not significant in relation to the total cases under this category.

Table 5 - Employer's Purpose in Dispensing Progressive Discipline

(n=78 cases)

Employer's Purpose	Frequency	%
punishment	3	3.7
correction of behaviour	73	92.7
rehabilitation – drugs, alcohol, gambling	5	6.0
deterrence to employee	52	63.4
deterrence to other employees	24	29.3
affect employee dignity/ threaten job security	44	53.7
bring home seriousness of misconduct	55	67.1

Table 5 shows the employer's purpose or aim behind the employer's dispensation of progressive discipline. It reflects the outcomes that the employers were hoping to achieve at the end of the disciplinary exercise. The figures have to be interpreted with care because the total frequencies will not add up to the total number of discipline cases (78 cases). This is due the fact that in most cases the employer had multiple intentions or aims to achieve as a result of the disciplinary exercise. For example, in a particular case, 'punishment', 'correction of behaviour' and 'deterrence to other employees' may all have been the intended purpose of the employer's disciplinary exercise.

It is worthwhile noting that correction of 'employee's behaviour', 'deterrence to employee' (preventing future occurrence of offence), 'deterrence to other employees' (disciplining the employee in question also acts as deterrent to other employees in future), 'affect employee dignity/ threaten job security' (employee's personal standing in the organisation is impacted in a negative sense and/or job security is threatened), and 'bring home seriousness of misconduct' to the employee were the significant aims of employers in carrying out progressive discipline. In a minor number of cases (3 cases or 3.8%), the employer intended to punish the employee for the alleged offence. This is not an ideal feature to have in any disciplinary system. As the literature review clearly demonstrates, the purpose of the system must be primarily to assist the employee to reach the performance standards required by the employer. Punishment may cause an

employee backlash, for example where the employee does not respond to the employers' demands or, in an extreme scenario, sabotages the employers' operations prior to the employee's termination of services.

Table 6 – Arbitrators' Responses to Employers Discipline System

(n = 78 cases)

ARBITRATORS' COMMENTS	FREQUENCY	%
Employer Related		
Employer mean spirited and/or inadequate system	2	1.3
alcohol & drugs policy adhered to except for summary dismissal which is not clear in policy	1	1.3
employer fair, patient & in line with award requirements	56	71.8
Employer did not provide adequate training/counselling for employee and/or poor training of supervisor	2	2.6
Employer did not sufficiently document warnings, counselling and did not provide necessary training for employee	10	9.0
employer impatient & placed unrealistic burdens - employee should have been give more time to improve	2	2.6
employer should have intervened earlier in rectifying performance	1	1.3
no concerted effort on employer's part to correct employee's behaviour	1	1.3
old warnings cannot be relied on	1	1.3
written warnings were not warranted - over reaction on part of employer	1	1.3
Employee Related		
employee unable to meet progressive cultural change - victim of circumstances	1	1.3
Total	78	100%

Table 6 is useful indeed as it gives a detailed insight into the arbitrator's (as a neutral third party) observations in relation to the system of discipline used by the employer. Generally employers were fair and patient in applying progressive discipline. However, one area requiring improvement is the necessity to sufficiently document warnings and counselling as well as

provide necessary training for employees so that they can attain the standards expected by the employer. This was collectively evident in 11.6% of the cases.

CONCLUSION

The study indicates that generally employers were fair and patient in applying progressive discipline. However, one area requiring improvement was the necessity to sufficiently document warnings and counselling as well as provide necessary training for employees so that they could attain the standards expected by the employer.

The concept of dealing with employee misconduct by way of progressive discipline may be one way of dealing with employee misconduct, to the exclusion of considering other approaches which may be appropriate in dealing with the complexities of the employer-employee relationship in today's workplace. It is hoped that this research will act as a catalyst for further research into developing new human resource models to deal with a more highly educated and sophisticated workforce.The literature review shows that the current model of progressive discipline was developed in the 1930s in response to American unions' demand that companies eliminate summary terminations and develop a progressive system of penalties that would provide a worker with protection against losing his/her job without first being fully aware that his/her job was at risk (Guffey and Helms, 2001: 111). It is not unreasonable to question the applicability and relevance of those principles, developed during the course of the industrial revolution, in today's environment.

Knowledge workers operating in the information age are well educated, have portable skills and are highly mobile. These employees may not respond to traditional progressive discipline especially when jobs are in abundance or the skills they possess are in short supply (for example IT skills) during boom times. Outsourcing and independent contractor arrangements have become very popular in recent times and are convenient ways for employers to avoid time-consuming disciplinary processes which may arise, especially when both employer and

employee are under pressure to reduce cycle time and increase response time. Work intensity has also increased in recent times.

As a result of advances in technology and global competition, employees are expected to do more in ever decreasing time spans and executive employees work longer hours than the official contracted hours just to meet ever-increasing employer demands. In the last decade, the work hours of both managerial and non-managerial occupations have steadily increased which has been exacerbated by higher work effort requirements, stress on the job, increase of pace of the job, and lower job and work/family balance satisfaction (ACCIRT, 1999:109). Furthermore, employers have had no hesitation in recent times to shed staff quickly in the name of flexibility, efficiency and corporate restructuring irregardless of loyalty, length of service or past contribution of staff (ACCIRT, 1999:112). These employer actions affect the morale of employees which in turn affects the performance of employees at work. Additionally, employees may be struggling to meet the increasing or even unreasonable demands of employers. These employees may find themselves being subjected to employers' disciplinary processes for failing to meet employers' unreasonable expectations. As long as the employer complies with the minimum requirements of the legislation in the dispensation of progressive discipline against these employees, the employer will be vindicated. However, true industrial injustice will remain unresolved. Therefore, the time may be ripe for the merits of the traditional progressive discipline to be reviewed by all concerned. Unions, pro-employee politicians and academics may need to lead the charge.

References

ACIRRT 1999, *Australia at Work*, Prentice Hall, Sydney.

AIRC 2001 (Online) Date of Article:28 December 2001. Date retrieved: 28 January 2003, Available: http:www.airc.gov.au/procedures/rules/ruleshtml.

Anderson, P. and Pulich, M. 2001, "A Positive Look at Progressive Discipline", *The Health Manager,* vol. 20, no. 1, pp. 1-10.

Anonymous 1999, "Avoiding Legal Pitfalls in the Disciplinary Process", *Association Management*, vol. 51, no. 3, p. 81.

AustLII Databases. (Online) Date of Article: no date. Date retrieved: 16 January 2001. Available: http:www.austlii.edu.au/cases/cth/IRCommA/toc-1987.html

Australia and New Zealand Standard Industrial Classification, (http:www.abs.goc.au/Ausstats/abs@nst/Lookup/NT00014E8A) 7 January 2001

Bernardi, L.M. 1997, "Maximizing Employee Performance through Progressive Discipline", *The Canadian Manager,* vol. 221, no. 1, pp. 14-17.

Falcone, P. 2000, "A Blueprint for Progressive Discipline and Terminations", *HR Focus,* vol. 77, no. 8, pp. 3-6.

Grote, D. 2001, "Discipline without Punishment", *Across the Board,* vol. 38, no. 5, pp. 52-58.

Guffey, C.J. and Helms, M.M. 2001, "Effective Employee Discipline: A Case of the Internal Revenue Service", *Public Personnel Management,* vol. 30, no. 1, pp. 111-128.

James v. Waltham Cross Urban District Council [1973] ICR, 398

Kleiner, B. and Pesulima, S. 1999, "Management: Professional Update on Discipline", *Australian Company Secretary*, vol. 51, no. 4, pp. 187-189.

Kleiner, B. and Dhanoa, D. 1998, "How to Conduct Due Process Discipline", *Australian Company Secretary*, vol. 50, no. 11, pp. 524-527.

Martin, L. 1990, "Discipline for Professional Employees", *Personnel Journal*, vol. 69, no. 12, pp. 27-8.

McGlyne, J. E. 1979, *Unfair Dismissal Cases*, 2nd edn, Butterworths, London.

McPhail v. Gibson [1977] I.C.R. 42

Scholz, K. 2001, "The Law of Employee Dismissals", *The Canadian Manager,* vol. 26, no. 4, pp. 9-12.

Windsor Smith v. Liu & Ors [1997] AIRC, 1525/97 M Print P7454

Workplace Relations Act, 1996 (Cth)

Workplace Relations and Other Legislation Amendment Act, 1997 (Cth)