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Thursday, September 14, 2023

Dentons' 24th annual Ottawa employment law client appreciation webinar

Grow | Protect | Operate | Finance

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Catherine P. Coulter

What's new and exciting in employment law?

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1. Fixed term contracts

- In *Monterosso v. Metro Frieghtliner Hamilton Inc.*, the Ontario Court of Appeal found that the agreement between the company and its independent contractor “clearly and unambiguously” provided a 6 year (72 month) fixed term that did not include any termination clause. Without such a provision, the court said that the company didn’t have the right to end the agreement only seven months into the contract.
- The court ended up awarding Mr. Monterosso 65 months (approximately 5.5 years) worth of fees, totaling about \$550,000 plus HST.
- Of note, while employees terminated early under an improperly drafted term contract do not need to take any steps to mitigate their damages, the court in *Monterosso* found that there was a requirement to try to mitigate.

2. Discrimination on the basis of citizenship

- In *Imperial Oil v. Haseeb*, the Ontario Court of Appeal found that Imperial Oil discriminated against Mr. Haseeb on the basis of citizenship because, despite an unrestricted right to work in Canada for three years under the federal government's Post-Graduate Work Permit Program (PGWP), Imperial Oil withdrew its conditional offer to Mr. Haseeb at least partially or indirectly based on his citizenship status.

3. Ontario minimum wage increase

- Minimum wage in Ontario is increasing on October 1, 2023 to \$16.55/hour.
- Ontario will have the highest minimum wage in the country.

4. OHSA amendments

- Effective as of June 1, 2023, there have been amendments to the Ontario *Occupational Health and Safety Act* (under Bill 88: the *Working for Workers Act, 2022*) which require certain employers to provide and maintain in good condition a naloxone kit in workplaces where they are aware, or ought to be aware, that there may be a risk of a **worker** having an opioid overdose.
- For example: when it's known that someone has an opioid issue, when there's already been an overdose in the workplace, or when opioid use or paraphernalia is observed in the workplace.

5. B.C. *Pay Transparency Act*

- Only applies to B.C. employers, and not to Ontario employers with B.C. employees
- Obligations:
 - Employers must not ask job applicants their previous pay rate
 - Employers must include the expected pay or pay range for publicly posted jobs as of Nov. 1/23
 - Employers may not discipline or harass employees who ask about their pay or reveal their pay to other employees
 - Starting Nov. 1/24, all employers with 1,000 or more employees must complete and post a pay transparency report; this obligation will roll out to all employers by 2027

6. *Canada Labour Code* amendments

Effective July 9, 2023:

1. Employers are required to provide a written statement containing information related to employees' employment within 30 days of the start of employment. The information in this statement includes the following:

- a. Names of the parties to the employment relationship;
- b. Job title of the employee and brief description of their duties and responsibilities;
- c. Address of the ordinary place of work;
- d. Date on which employment commences;
- e. Term of the employment;
- f. Duration of the probationary period (if any);
- g. Description of the necessary qualifications of the position;
- h. Description of any required training for the position;
- i. Hours of work for the employee, including information on the calculation of those hours and rules regarding overtime;
- j. Rate of wages or salary and the rate of overtime pay;
- k. Frequency of pay days and the frequency of payment of any other remuneration;
- l. Mandatory deductions from wages; and
- m. Information about how the employee can claim reimbursement of reasonable work-related expenses.

Canada Labour Code amendments, con't.

Effective July 9, 2023:

2. Employers are required to reimburse employees for reasonable work-related expenses, within 30 days of an expense claim being submitted. Information on the factors to consider when determining whether or not an expense is work-related are set out in the *Canada Labour Standards Regulations*, and include the following:
 - a. Whether the expense is connected to the employee's performance of work;
 - b. Whether the expense enables an employee to perform work;
 - c. Whether incurring the expense is required by the employer as a condition of employment or continued employment;
 - d. Whether the expense satisfies a requirement for the employee's work imposed by an occupational health or safety standard; and
 - e. Whether the expense is incurred for a legitimate business purpose and not for personal use or enjoyment.

3. As of December 15, 2023, federally regulated employers will be required to make menstrual products available to workers at no cost while they are in the workplace.

7. Amendments to the Ontario ESA

Working for Workers Act, 2023 (Bill 79)

- Under the proposed changes, employees who work solely from home will be eligible for the same enhanced notice as "in-office" and other employees in mass termination situations. This would ensure that remote employees receive the same eight week minimum notice of termination or pay-in-lieu that non-remote employees are eligible for in certain circumstances.
- This legislation passed 2nd reading and has been ordered for 3rd reading, which will likely take place this autumn

8. *Digital Platform Workers Rights Act*

- Not yet in effect.
- Among the rights which look like they're in line to be granted to digital platform workers (eg. Uber drivers), are the following:
 - Minimum wage as per the ESA. Tips may not be included in the minimum wage amount.
 - A consistent pay that includes tips.
 - The operator must provide certain information to workers in advance, including a description of how pay is calculated, how any tips or other gratuities will be collected, the recurring pay period, factors to determine work assignments, whether a performance rating system is used and if there are consequences based on a worker's performance rating.
 - Protection from reprisal.

9. Independent tort of harassment

Alberta Health Services v. Johnston:

- New Alberta tort of harassment which can be litigated in the courts and is defined as follows:
 - (i) The defendant has engaged in repeated communications, threats, insults, stalking, or other harassing behaviors in person or through other means;
 - (ii) that they knew or ought to have known was unwelcome;
 - (iii) which impugn the dignity of the plaintiff, would cause a reasonable person to fear for their safety or the safety of their loved ones, or could foreseeably cause emotional distress; and
 - (iv) caused harm.
- This is to be contrasted with Ontario, where employees subjected to harassment may currently only make complaints: (i) to the HRTO if the harassment has a protected ground element to it; (ii) to the Ministry of Labour if there is no protected ground; or (iii) potentially under the *Workplace Safety and Insurance Act* if the employer is insured.

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Maggie Sullivan

What's in a name?

A primer on the difference between independent contractors and employees

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Consequences of Misclassification

Employers may be subject to liability with respect to the following:

CRA

- Employer tax deductions; fines for non-compliance

WSIB

- Investigation into your workplace; repayment of outstanding premiums; significant fines for both the Company and Directors and Officers personally; a provincial offence

Employment Standards

- Vacation pay; overtime pay; leave entitlements; termination pay
- Fines and potential criminal sanctions
- Personal Director liability

Is your contractor really an employee?

Business/Information Technology Consultants

As of January 1, 2023:

- To work as an independent contractor in business consulting or information technology consulting, the contractor must:
 1. Meet the definition of a “business consultant” or “information technology consultant” in the ESA;
 2. Provide their services through a personal service corporation or a sole proprietorship as opposed to in their own name;
 3. Be paid a fee of \$60/hour or greater; and
 4. Have a written agreement setting out the foregoing.

Is your contractor really an employee?

Business/Information Technology Consultants

Business Consultant

- Someone who provides advice or services to a business or organization on its performance, including advice or services in respect of operations, profitability, management, structure, processes, finances, accounting, procurements, human resources, environmental impacts, marketing, risk management, compliance, or strategy of the business or organization.

Information Technology Consultant

- Someone who provides advice or services to a business or organization on its information technology systems, including planning, designing, analyzing, documenting, configuring, developing, testing, and installing.

Is your contractor really an employee?

The Nature of the Relationship

The 2001 Supreme Court of Canada case of 671122 *Ontario Ltd. v. Sagaz Industries Canada Inc.* (*Sagaz*) remains the leading case on distinguishing between an employee and an independent contractor. The Court said:

- “The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker’s activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker’s opportunity for profit in the performance of his or her tasks. It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

Is your contractor really an employee?

The Nature of the Relationship

In addition to the explicit statutory requirements under the ESA for business and information technology consultants, the courts may look at, *inter alia*, the following factors in determining the status of the individual providing services to your company:

- Written agreement – the court will look at the terms of any written agreement and consider the intention of the parties, though this will not be determinative
- Statutory deductions – if you take statutory deductions from the pay of your service provider, the courts will make the finding that you intended them to be an employee;
- Exclusivity arrangements – if you want the individual to be classified as a contractor, you should not require them to enter into an exclusivity arrangement whereby they are not permitted to work for any other company or entity at the same time that they are providing services to your company
- Job titles – contractors are not employees. Therefore, they should not be given job titles within the company
- Length of agreement – generally speaking, an employment arrangement will be for an indefinite period of time. If you are preparing an agreement for a contractor, try to narrow the length of the agreement to the specified time period or specified task for which you will require their services.

Dependent Contractors

The Middle Ground between Employee and Contractor

A person may be found to be a dependent contractor when:

- There is near or complete exclusivity between the individual and the company; and
- The individual is economically dependent on the company such that the working arrangement accounts for “substantially more than a majority” of the contractor’s income.

Consequences of being deemed a dependent contractor:

- Dependent contractors are entitled to common law reasonable notice upon termination

If the assessment leads to the conclusion that the person fits or may fit the definition of dependent contractor, then it is likely best to insist on an employment relationship and employment agreement instead.

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Colleen Hoey

The many paths to constructive dismissal

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“They really want me out of here Gerry, they’ve downgraded me to some kind of bunker”



And when that did not work....



Constructive Dismissal

Constructive Dismissal Defined

The Supreme Court of Canada in *Potter v New Brunswick Legal Aid Services, 2015*, recognized two ways to determine whether a constructive dismissal has occurred, which requires establishing that the employer either:

(a) Breached an express or implied term of the employment contract (“Branch 1”);

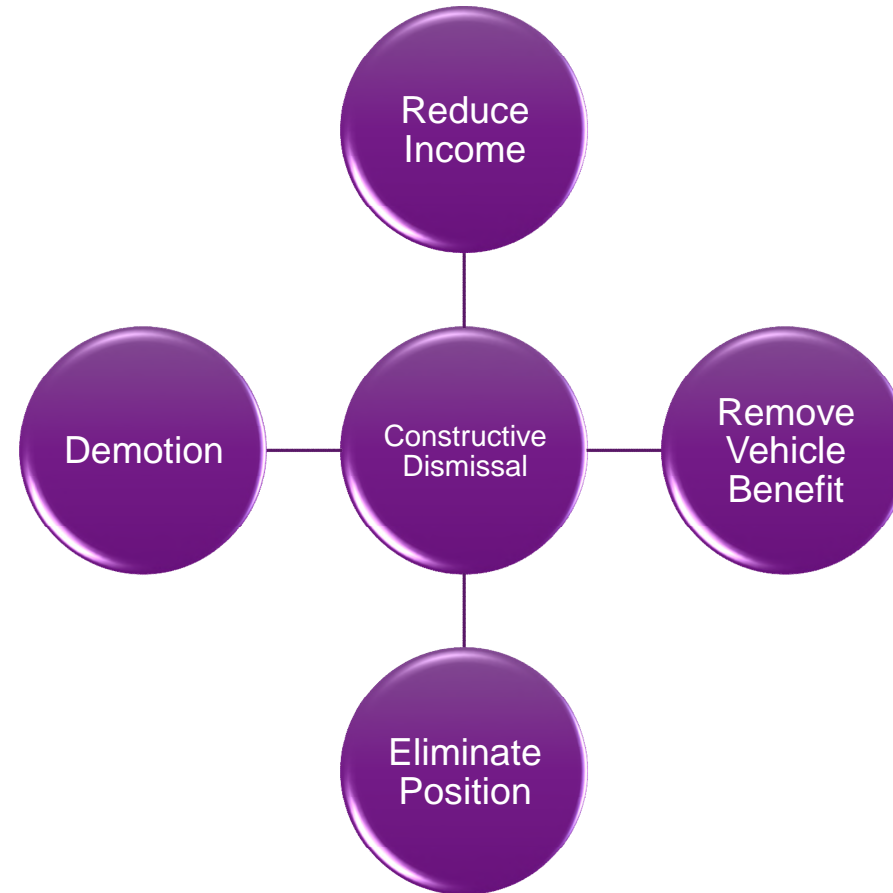
(i) Contractual term must have been “objectively” breached

(ii) Breach must be sufficiently serious from the perspective of a reasonable employee

•or

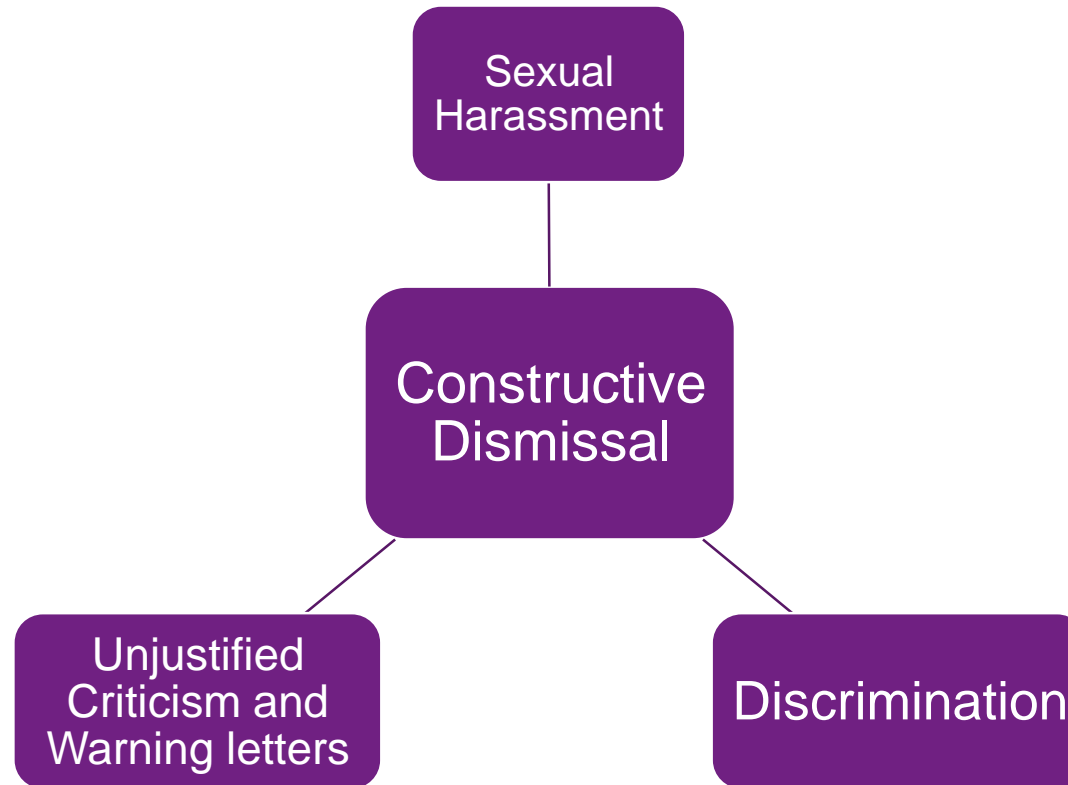
(a) Conducted itself in a manner that makes continued employment for the employee intolerable or shows an intention not to be bound by the employment contract further (“Branch 2”).

Examples of Breaches of Essential Term



Examples of Implied Term

Civility, Decency, Respect, Non – Poisoned Workplace



Recent Developments

Temporary Lay Offs and Constructive Dismissal

Pham v. Qualified Metal Fabricators Ltd., 2023 ONCA

- Prior layoffs does not create legal basis to place an employee on layoff
- The right to impose a layoff as an implied term must be notorious, even obvious, from the facts of the situation.
- When an employer unilaterally lays off an employee the employee may (i) elect to wait and see if they will later be able to return to their previous job or (ii) treat the layoff as a wrongful dismissal.
- Employee must object to change to the terms of their employment within a reasonable time.
- An impermissible layoff that would otherwise support a finding of constructive dismissal may be condoned by the employee. It is up to the employer to prove the employee condoned the layoff.

Recall to the Office and Constructive Dismissal

- Express vs. Implied terms regarding work location
- Express contractual right to modify the arrangement depending on the needs of the business?
- Consider Human Rights/ Accommodation issues

How Can Employers Effect Change?

- Review the employment agreements
- Provide advanced written notice with consideration.
- Consider how the change is communicated and carried out.
- Request employee consent
- If the employee objects, consider recalling the employee to work as a means to mitigate their losses

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Stephanie V. Lewis

Tips and tricks for dealing with progressive discipline

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Performance Management and Coaching v. Discipline

What is the difference between performance management and discipline?

- Coaching:
 - Communicating expectations
 - Offering assistance
 - Teaching an employee how to do something in order to help them succeed
- Discipline:
 - Addresses culpable conduct
 - May include a warning regarding consequences
 - Involves sanctions or ramifications for the employee

Can there be overlap between coaching and discipline?

When may non disciplinary approaches to employee conduct be appropriate?

What is Progressive Discipline?

Progressive Discipline:

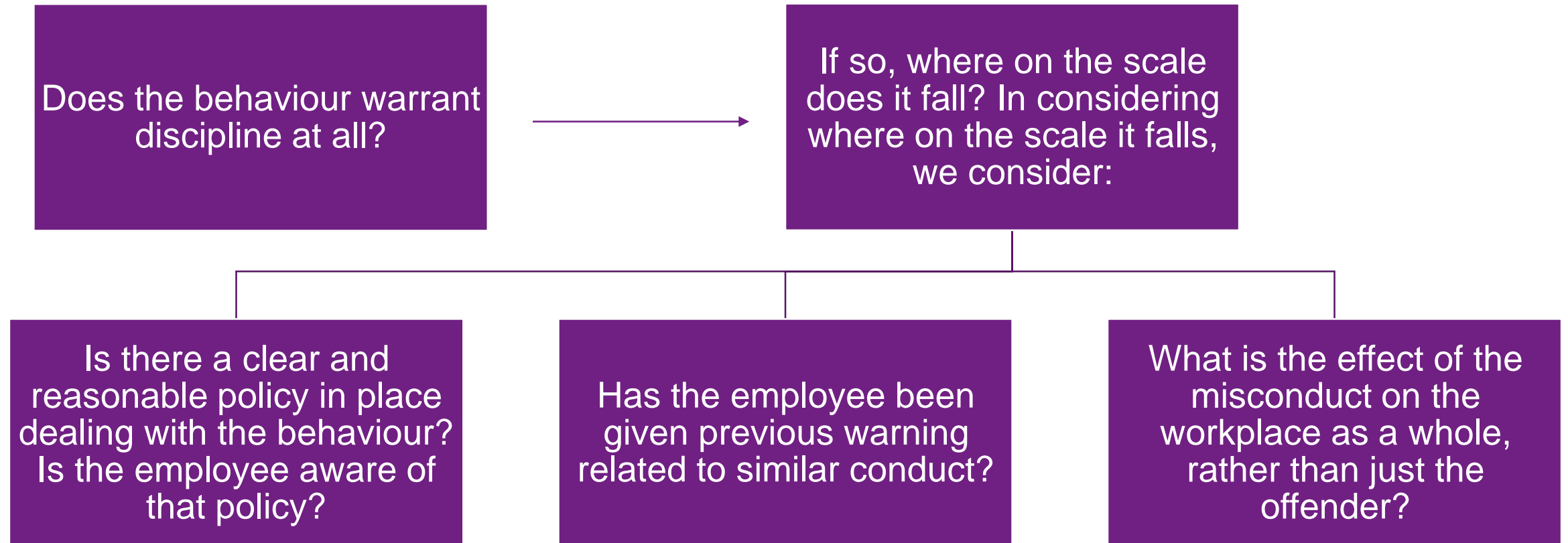
- the process of using increasingly severe steps or measures when an employee fails to correct a problem after being given a reasonable opportunity to do so.

Steps usually associated with Progressive Discipline:

- Oral warning
- Written warning
- Training
- Suspension (paid v. unpaid)
- Termination of employment

Do employers always need to follow the progressive discipline steps?

Considerations When Faced with a Potential Progressive Discipline Situation



Behaviour That Likely Warrants More Serious Discipline

Behaviour that has jeopardized the safety of the workplace and the people in it – think negligent or reckless disregard for safety;

Sexual harassment with a physical component;

When employees have committed serious criminal offences; and,

Human rights breaches.

Progressive Discipline – Mitigating Factors

What are some mitigating factors that might lead employers to reconsider the level of discipline:

When someone's conduct was provoked through the unreasonable or abusive conduct of someone else in the workplace;

Where the employee is undergoing an period of unusual stress;

Where the behaviour is impacted by a medical disability requiring accommodation;

Where the employee has a lengthy and otherwise unblemished performance record; and,

An absence of premeditation.

Progressive Discipline Steps: Are there any magic shortcuts?

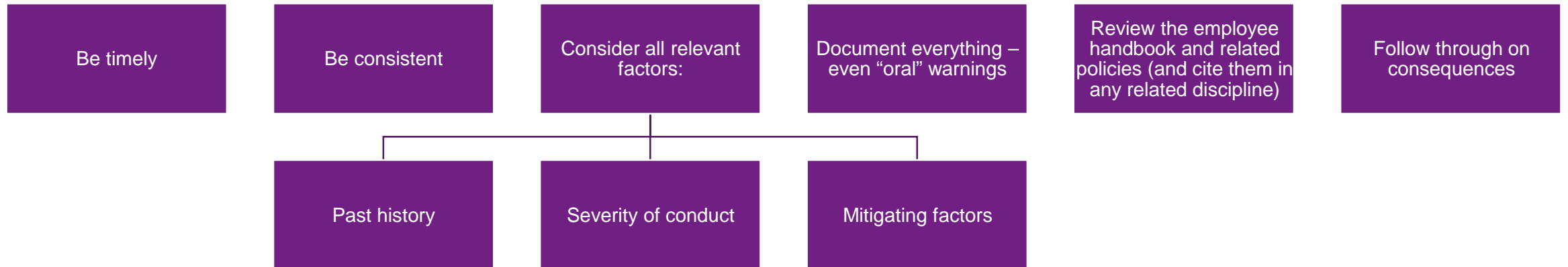
Can employers use contractual terms to automatically skip steps in the progressive discipline process?

- *Waksdale* considerations and ESA requirements

Can employers rely on Zero Tolerance policies to terminate for prohibited conduct?

- Court analysis in *Render*

Progressive Discipline Best Practices



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Thank you



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