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## SHE'S LOVIN' IT! POOR USE OF PERFORMANCE PLAN LEADS TO WRONGFUL DISMISSAL

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The recent Ontario Superior Court of Justice decision in *Brake v. PJ-M2R Restaurant Inc.* (2016 ONSC 1795) provides a useful reminder to employers of how not to use performance improvement plans ("PIPs"). It also demonstrates the challenges employers face in dismissing long-service employees for cause due to poor performance.

### Background Facts

Esther Brake was a 20 year employee of PJ-M2R Restaurant Inc., a McDonald's franchisee. Brake managed the employer's McDonald's franchise in Kanata, Ontario from 2004 to 2011, receiving very strong performance evaluations until 2011.

After receiving her first negative performance review in November 2011, Brake was transferred to another of the employer's franchises, a small, chronically underperforming McDonald's restaurant located in a Wal-Mart. Three months after Brake began managing the Wal-Mart location, she was put on a PIP.

Ultimately, the employer told Brake that she failed the PIP and had to "take a demotion or go." Brake refused the demotion and was dismissed for cause in August, three months after being placed on the PIP.

### No Cause for Dismissal

In its review of the facts, the Court did not provide any detail on what the performance issues were and only stated that "there was some evidence that [Brake] ran into some difficulty in 2011 and 2012". However, the Court concluded that the employer "set [Brake] up to fail" by imposing the PIP. The Court found that the employer's measurement of Brake's performance was arbitrary and unfair, noting that her goals under the PIP were objectively more difficult than the standards by which her performance had been judged in the past.

The Court therefore found that there was no cause for her dismissal given her history of strong performance and the fact that despite being set up to fail, her performance at the Wal-Mart location was actually trending upward. Given Brake's approximately 20 years of service and age (62), the Court awarded her 20 months' notice, totalling \$104,499.33 in damages.

### What This Means for Employers

The employer in this case ran afoul of some fundamental principles when trying to use PIPs to improve an employee's performance:

- vague, arbitrary and unreasonable standards: an employer cannot expect an employee to become the best employee in the company, so clear, reasonable and objective standards should be used in determining the goals of the PIP.
- failure to follow up: an employer should not impose a PIP and then walk away; regular meetings should be held to discuss where the employee is in relation to the objectives of the PIP.
- lack of time: courts will typically not endorse a three-month PIP for a 20 year employee, so consideration should be given as to how long it might take for the employee to meet continued acceptable performance.

The other fundamental issue that the employer had to overcome was a demonstrated record of strong performance. Courts are likely to question an employer's motives when it suddenly concludes that an employee's performance is unacceptable when previous performance reviews indicate strong performance. Moving too quickly to a PIP can be questioned by a court or tribunal when there may have been other ways to handle the performance issues before taking that step (e.g. engaging in informal coaching and counselling meetings, outside training being provided, etc.).

PIPs can be used effectively by an employer to improve an employee's performance and that should remain the primary objective of a PIP. If an employee responds poorly to the PIP, either by demonstrating an insubordinate or belligerent attitude, or by refusing to take steps to improve performance, the PIP becomes connected with a course of discipline that can lead to a cause termination. However, the PIP must be implemented and managed carefully if it is going to achieve the goal of improved performance or to show that the employee's reaction to the PIP provided cause for dismissal.

*If you have any questions about this case or about how to effectively use PIPs, please contact any member of the McMillan LLP Employment and Labour Relations group.*