

## Emerging issues in attendance management

Innocent absenteeism is one of the thorniest issues for management to deal with. Beyond the difficulties entailed in crafting a reasonable and remedial approach that will pass muster at arbitration, employers must also have regard to the impact of human rights law when devising programs for controlling innocent absenteeism.

Many of the factors to consider in managing innocent absenteeism in a unionized workplace were discussed in ["Managing innocent absenteeism in the unionized workplace"](#). In this article, we look at some developments in the law of innocent absenteeism that have emerged in recent years. (For more recent developments, see ["Attendance management program found wanting by arbitrator"](#).)

### TERMINATION FOR INNOCENT ABSENTEEISM - HUMAN RIGHTS ISSUES

It is clear that an employer's efforts to manage innocent absenteeism must comply with human rights legislation. This requirement is particularly acute when a decision has been taken to terminate an employee for innocent absenteeism. Here, it is important to bear in mind that innocent absenteeism may take two forms: one where the absenteeism is due to a condition that is a "handicap" under human rights legislation, and one where it is not. If the condition is a handicap, the employer must be careful to ensure that its response does not run afoul of human rights law.

The consequences can be seen in *OPSEU v. Government of Ontario (Blackhall)*, a 1996 decision of the Divisional Court. This case concerned a grievor who suffered from "obsessive compulsive disorder", a handicap within the meaning of the Ontario *Human Rights Code*. He was terminated for innocent absenteeism, then reinstated subject to a "last chance agreement" stipulating that he had to meet the average attendance record for his department in each six-month period over the next two years. Owing to his disability, he failed to meet the condition and was terminated. His dismissal was upheld at arbitration.

The union applied to court to have the decision quashed, arguing that the last chance agreement was illegal and unenforceable. The Court agreed with the union, pointing to the facts that the agreement required the grievor to meet a standard not imposed on other, non-disabled, employees, and that the employer had relied on absences linked to the grievor's disability in determining that he had failed to maintain average attendance levels.

The message of this and similar decisions would appear to be the following: employers considering dismissal due to an employee's breach of a last chance agreement requiring the employee to maintain a specified attendance level should be careful not to rely on any absences due to a disability under human rights law. Alternatively, if the absenteeism relied on is attributable to a disability, the employer must be prepared to show that it has accommodated the employee to the point of undue hardship.

## LAST CHANCE AGREEMENTS - A FORM OF ACCOMMODATION?

This raises the question of whether the existence of a last chance agreement is, in itself, a form of accommodation sufficient to meet the employer's human rights obligations. While there may be some suggestion in the case law that these agreements are a form of accommodation, the probable answer is that the employer will have to show that more was done than merely extending the employee one last chance before termination.

This can be seen in *Stelco Inc. v. USWA, Local 1005* (July 7, 2000), a case in which the grievor suffered from depression and panic disorder. He had entered into no less than three last chance agreements in 1997 and 1998, years in which he was absent from work 40 percent and 67 percent of the time respectively. Among the union's arguments were the assertions that the company had failed to accommodate him to the point of undue hardship, and that the agreements discriminated against him by requiring him to adhere to conditions not imposed on other employees.

The arbitrator held that the agreements were not discriminatory, and that the grievor had been accommodated to the point of undue hardship. She noted that the company had accommodated the grievor in a variety of ways, such as facilitating his attendance at a residential treatment program and rescheduling his vacation time. Further, the employer had entered into the series of agreements only after tolerating a lengthy period of intermittent absenteeism. Accordingly, the arbitrator held that the company could not reasonably have been expected to do more for the grievor.

It has been suggested that parties to last chance agreements should include a number of standard clauses, such as outlining the steps the employer has taken to assist the employee with his or her absenteeism, or stipulating that the agreement and the steps taken in connection with the agreement fulfill the parties' obligations to accommodate the grievor. However, in *Ottawa-Carleton Public Employees' Union v. Ottawa-Carleton (Regional Municipality)* (June 2, 2000), where the employer took the position that, if the parties agree that the agreement reasonably accommodates the needs of the grievor, the union is precluded from subsequently questioning the legality of the agreement, the arbitrator disagreed, drawing a parallel between this position and automatic termination clauses:

"[A]s for the parties expressly "agreeing" that what the employer has done, including the entering into of the "last chance" agreement, meets the obligation of the Code, such a stipulation would not seem to be materially different (from the point of view of a potential over-ride by the Court) from an agreement that a future termination itself under the agreement will be deemed a proper one. Rather, the legality of any discharge is likely still to turn on whether, on the facts, the employer is found to have accommodated this employee's problem, to the point of undue hardship."

In other words, employers should be prepared to justify any future decision to terminate the employee not based on the terms of the agreement, but on the employee's subsequent absenteeism and the employer's over all efforts to accommodate the employee, of which the agreement is just one piece of evidence.

## EMPLOYEES' OBLIGATIONS IN COOPERATING WITH ACCOMMODATION

In determining the legality of a termination for innocent absenteeism due to disability, the employee's actions also will come under scrutiny. Courts and arbitrators have held that employees have a duty to facilitate the employer's efforts to offer accommodation. This includes an obligation to identify the employee's restrictions and to keep the employer informed of the employee's health status and ability to perform work. Failure by an employee to cooperate in his

or her accommodation may well result in the termination being upheld, even when the point of undue hardship has not been reached.

This was the result in *Toronto Board of Education v. CUPE, Local 4400* (April 19, 2000) in which two grievors were held to have failed in their obligation to facilitate their accommodation. By failing to contact the employer's representatives, and by withholding information regarding their health status, restrictions or the accommodation required, they permitted the employer to conclude they should be terminated.

As noted, an important aspect of the employee's obligation to cooperate is the provision of medical and health information, a fact that sits uneasily beside the employee's right to medical confidentiality. The truth of the matter is that disabled employees overly zealous in the protection of their confidentiality run the risk of jeopardizing efforts to accommodate their restrictions and, consequently, of having their employment terminated.

Employers seeking relevant health information about a disabled employee should bear in mind that they are not entitled to a diagnosis of the employee's illness or disability, or to information about the specific treatment being received. The employer may, however, legitimately request some information about the employee, including:

- the prognosis for full or partial recovery;
- fitness to return to work;
- fitness to perform specific components of his or her pre-injury job; and
- the likely duration of any physical restrictions or limitations following the employee's return to work.

### In Our View

As pointed out in our previous discussion of managing innocent absenteeism, employers' efforts to control this problem through means such as attendance management programs must meet the following criteria to ensure they will be ruled legal at arbitration:

- there must be no conflict with the collective agreement;
- the employer's response must be administrative and remedial, not disciplinary, in nature; and
- measures taken to control innocent absenteeism must be reasonable in their formulation and application.

To this must be added the requirement that any such measures not conflict with human rights law, where the innocent absenteeism is due to a handicap or disability as defined in provincial or federal human rights legislation. To ensure this requirement is met, employers must take care not to impose standards on disabled employees to which others are not held, and to offer disabled employees reasonable accommodation to the point of undue hardship. For a more complete discussion of forms of accommodation and undue hardship, see "[The duty to accommodate in action](#)" and "[Accommodating disability short of undue hardship](#)".

For further information, please contact [Lynn Harnden](#) at (613) 563-7660, Extension 226.

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