

Labour Board holds attendance management program not in breach of emergency leave provisions of *ESA*

The Ontario Labour Relations Board has once again considered the application of the emergency leave provisions of the *Employment Standards Act, 2000 (ESA)*. Those provisions allow employees in workplaces that regularly employ 50 or more employees to take up to 10 days of unpaid leave a year to deal with urgent matters that relate to them or to specified family members (see "[Emergency leave and agreements under the ESA 2000: new variables in the workplace mix](#)" and "[Parental leave, overtime rules among major changes in new Employment Standards Act](#)" on our Publications page).

In *Honda of Canada MFG* (July 22, 2005), the Board overruled the decision of an Employment Standards Officer that required the employer to pay over \$36,000 in damages to an employee it had dismissed. The case concerned the application of the employer's Attendance Counselling Program to the employee. The Program provided up to four levels of counselling to employees who were unable to maintain a reasonable level of attendance. A second session of counselling at the highest level within a three-year period could result in the employee's termination.

The employee in question was terminated following a four-day absence for which he had provided a physician's letter dated on the day of his return to work. The Program required that physician's letters be dated during the absence and cover the entire period of the absence.

The Employment Standards Officer investigated the termination and found that the employer had contravened the employee's right to emergency leave under the *ESA*. The Officer also found that the employer had terminated the employee in reprisal for exercising his rights under the Act. The employer applied to the Board to review the Officer's decision.

BOARD: NO CONTRAVENTION OF EMERGENCY LEAVE PROVISIONS

The Board rejected the conclusions reached by the Officer, holding that the documentation required by the employer to substantiate the employee's absence was reasonable. Noting that the *ESA* permits an employer to request reasonable evidence in support of the use of emergency leave, the Board expressed the view that the documentation supplied by the employee was no more than a self-report of his state of health:

"[I]t was not unreasonable for the Company to require medical evidence which went beyond [the employee's] self-report of his state of health. His producing a medical report after his absence, concerning the state of his health prior to his medical examination, was a self-report because he was not examined by a doctor during the period of his absence. ... In these circumstances it was not unreasonable for the Company to apply the provisions of the Program... ."

The Board then concluded that the employee had not been terminated as a reprisal for exercising his rights under the *ESA* but, rather, because he had not met the reasonable attendance requirements of the Program. Accordingly, the employer's application was allowed.

In Our View

This case is also a reminder that a physician's note may not protect an employee from discipline in certain circumstances (see also "[Arbitrator: Doctor's note not always a complete defence to discipline](#)" on our What's New page). For another case in which the Board has held that the termination of an employee who invoked the emergency leave provisions was not in violation of the *ESA*, see "[Labour Board looks at emergency leave provisions of ESA](#)" on our What's New page.

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