

Arbitrator upholds termination for excessive absenteeism

Date : July 1, 2014

A recent arbitration decision upheld the termination of an employee for excessive but innocent absenteeism. In [Sault Area Hospital and Ontario Nurses' Association](#) (April, 2014), the nurse suffered from various gastrointestinal and respiratory illnesses which seemed to reoccur every few months causing her to miss work. The Hospital repeatedly offered to consider accommodation, but the nurse chose not to consider any type of part-time or transfer options. Readers of Focus will remember that an arbitrator previously upheld the conversion from full-time to part-time as a final attempt to accommodate an employee's excessive absenteeism ([Conversion from full-time to part-time due to excessive absenteeism – Arbitrator upholds Hospital's action](#)). The Hospital eventually terminated the nurse's employment claiming that the employment contract was frustrated by years of poor attendance. The Union grieved the termination and sought reinstatement on the basis that the Hospital failed to show that the absenteeism was so excessive that the employment relationship was fundamentally and irreparably breached.

At arbitration, Arbitrator Hayes set out the test for the termination of an employee for innocent absenteeism:

In short, it is accepted that an employer seeking to sustain the termination of an employee in the case of innocent absenteeism must establish: (a) undue absenteeism in the grievor's past record, and, (b) that the grievor is incapable of regular attendance into the future. [Para 52]

In terms of the first part of the test, the Arbitrator had little difficulty concluding that the grievor's absenteeism was excessive. The grievor's absenteeism was well above the average for her department, and she had been in the Hospital's Attendance Management Program (AMP) for several years. Under the AMP, the grievor was warned that her attendance would be monitored for the following six month period. During this time the grievor's attendance showed no improvement.

In considering the second part of test, the Arbitrator noted that there was no evidence that the grievor's attendance would improve in the future. In fact, the grievor's own family physician, in responding to questions posed through the AMP, stated that the Hospital should not expect any improvement in the grievor's attendance in the future. The Arbitrator concluded that if the grievor was reinstated, it would be highly unlikely that she would attend work on a regular basis.

Having found that the Hospital had satisfied both parts of the test, the grievance was dismissed.

For further information, please contact [André Champagne](#) at (613) 940-2735.