

How can I manage you if you are never here?

Attendance Management and the Duty to Accommodate

Lynn H. Harnden

Vicky Satta

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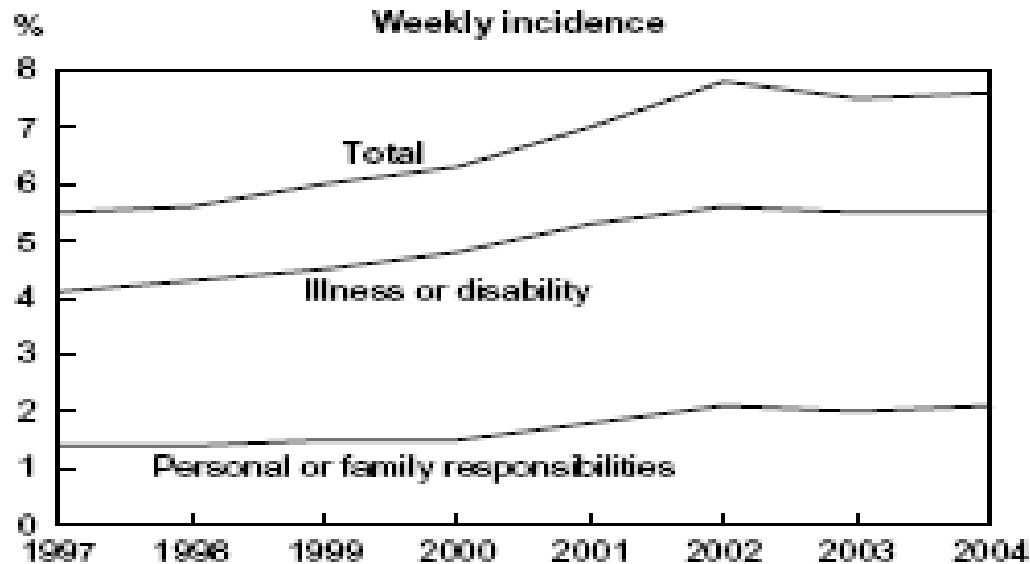
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Overview

- Introduction of an attendance management program
- Chronic absenteeism – how much must be tolerated
- Discharging a disabled employee
- Last chance agreements
- Frustration of the employment contract

Introduction of an Attendance Management Program

Weekly Work Absence Rates 1997 to 2004



- Source: Statistics Canada (April, 2005) *Perspectives: Fact Sheet on Work Absences*

Attendance management program

- Formal Programs v. Workplace Practice
- Distinguish between innocent and culpable absenteeism
- Ensure there is no conflict with the collective agreement
- Should be administrative not disciplinary in nature
- Reasonable in its design, reasonably administered
- Consistent with Human Rights legislation

Communicating the need for attendance management

- Absenteeism
 - Costs associated
 - Financial, productivity, and administrative
 - Causes stress for employees who must replace absent co-workers
 - Affects employee/team morale
 - Disrupts the workplace
 - Affects the company's bottom line

Attendance Management Program

Contents

- Policy statement and goals of program (organization and individual), objectives, describe problems absenteeism creates (supportive approach)
- Absence reporting procedure
- Requirements for substantiating absences
- Identification of absenteeism problem
- Roles of individuals in the organization (employees, human resources, managers, occupational health and safety nurse)

Attendance Management Program

Contents

- Emphasis on individual treatment
 - Avoid “automatic” responses that ignore individual circumstances
 - Leave room for exceptions, accommodation or discretion on individual circumstances at each stage of the process

Attendance Management Program

Contents

- Identification of an attendance problem – notice to employee
- Continued monitoring
- Counselling guidelines (EAP, Occupational Health & Safety etc.)
- Action plan

Implementing an Attendance Management Program

- Project a positive message
- If attendance is not measured, it is not managed

Implementation issues to consider

- Union and employee concerns
 - Collective agreement has rules (ie. medical certificates; reporting obligations)
 - Information collected and used must be valid and fair
 - Confidentiality of health-related information (Privacy Rights)
 - Individuals with disabilities

Chronic absenteeism – how much must be tolerated

Decision to Terminate

Two-stage test at arbitration

Typically required:

- Demonstration of the employee's past excessive absenteeism; and
- Evidence of the employee's unlikely ability to provide reasonably regular attendance in the future

Decision to Terminate / Human Rights Considerations

- Where absence due to a “disability”, employer must demonstrate
 - Duty to accommodate
 - Undue hardship

Duty to accommodate satisfied where...

- There is no evidence of an employee's need for accommodation to resume regular attendance
- No accommodation is possible because of the nature or severity of the employee's disability
- There have been a number of failed attempts at accommodation in the past
- The employee has failed to act reasonably in the accommodation process
- *Desormeaux v. Ottawa-Carleton Regional Transit Commission* (2005; Fed. C.A.)
 - Leave to Appeal to the Supreme Court of Canada was dismissed on March 23, 2006

St Joseph's General Hospital v. ONA (Ontario; 2006)

Facts

- Ms Schryer terminated as a full-time registered nurse on June 15, 2005 for alleged innocent absenteeism
- Hospital claimed that the grievor's 61% absenteeism rate since becoming a full-time nurse was "spectacularly excessive"

St Joseph's General Hospital v. ONA (Ontario; 2006)

- Hospital had “three basic arguments” in support of termination
 - Attendance standard of 67.5 hours in any 12 month period, as defined under attendance awareness policy, was “reasonable”
 - Past absenteeism of the grievor was unreasonably excessive
 - “No question” that the absenteeism was excessive and that the grievor exhibited little chance of providing reasonably consistent attendance in the future having regard to her record of absenteeism after her return on Nov. 22

St Joseph's General Hospital v. ONA (Ontario; 2006)

- Association advanced 4 reasons why the grievances should be allowed
 - Hospital failed to discharge its burden to prove that there was no likelihood of the Grievor providing regular employment in the future
 - Hospital's attendance standard of 67.5 hours was both unreasonable under the collective agreement and illegal under section 50 of the ESA
 - Evidence was conclusive that the Grievor's depression constituted a disability under the *Human Rights Code*; hospital's policy violated the *Code*

St Joseph's General Hospital v. ONA (Ontario; 2006)

Decision

- Grievor's intermittent absences in 2005 were not due to a disability under the *Human Rights Code*
- Even if absences due to disability, depressive illness was accommodated to the full extent requested, no violation of the *Human Rights Code* has been made out

St Joseph's General Hospital v. ONA (Ontario; 2006)

Decision

- Hospital did not show attendance standard was reasonable, nor that the grievor's absenteeism was excessive
- Termination was without just cause
- ESA violation

Discharging a disabled employee

Keays v. Honda Canada Inc. (2005; Ont. S.C.J.)

- Keays awarded **24 months** notice period
 - 15 mos pay in lieu of notice based on 'Bardal Factors'
 - Additional 9 mos salary (Wallace Damages)
- Keays also awarded **\$500,000** punitive damages based on independent actionable wrong of harassment/discrimination
- No damages for breach of *Human Rights Code*
 - *"...with significant reluctance, I am forced to find that this court is without jurisdiction to consider this basis of relief. However, these complaints could constitute "independent actionable wrongs" such as to trigger an award of punitive damages, assuming they also merit punishment..."*

Appeal scheduled to be heard on April 3, 2006

Update

Keays v. Honda (2006; Ont. S.C.J.)

Cost Procedure

- Keays awarded \$ 610 000 in costs
 - *...I had little difficulty in rejecting Honda's position that the termination was a proportional response to the plaintiff's alleged subordination. The plaintiff seeks his costs of this litigation on a substantial indemnity basis, including a claim for a premium. The defendant does not retract from it's position throughout that the plaintiff was in the wrong. It resists his costs claim vigorously without any sense of apology, remorse or regret. It is with this landscape in mind that I approach my task.*

Enforceability of last chance agreements

Last Chance Agreements

- Often in response to situation where grounds for discharge of employee in unionized context for culpable/non-culpable reasons
- Reinstatement conditional upon employee meeting conditions set out in the agreement
- May stipulate that failure to adhere to any conditions will result in automatic termination, without recourse to the grievance procedure

Last Chance Agreements

Attendance related problems

- Agreement provides employee will be discharged if employee fails to comply with regular attendance conditions
- Ensure attendance requirements are not more onerous than standard in attendance management policy
- Outline steps employer has taken to help employee with absenteeism problem

York Region District School Board and CUPE, Local 1196 (2004; Ontario)

Facts

- The grievor suffered from alcoholism
- There was a long history of accommodation as well as discipline
- A last chance agreement had been signed
- On February 26th, the Grievor could not get his truck to start and called for a tow truck

York Region District School Board and CUPE, Local 1196 (2004; Ontario)

Facts

- While waiting for the tow truck he went to the liquor store and purchased some alcohol, and drank the alcohol in his truck
- The next day he phoned in and advised his supervisor that he would not be able to work

York Region District School Board and CUPE, Local 1196 (2004; Ontario)

Decision

- The arbitrator accepted that a breach in the last chance agreement amounted to just cause
- The employer made every effort to accommodate the grievor
- Not an appropriate situation to exercise discretion and substitute a lesser penalty

Frustration of the employment contract

Frustration of Contract

- Performance of contract impossible or fundamentally different

Proving Frustration of Contract

- Excessive, long term (2 + years) absence
- Poor prognosis for return to work (future attendance shows no promise of improvement)
- Duty to accommodate to the point of undue hardship
- Entitlement to severance pay

Trevitt v. Blanche Equipment Rentals (B.C.S.C.; 2006)

Facts

- Trevitt was employed as a heavy equipment mechanic
- He was involved in a motor vehicle accident (unrelated to his work)
- He suffered several injuries in the accident and was been unable to work
- At the time of his accident he remained the foreman and the only licensed heavy equipment mechanic
- The company hired a replacement

Trevitt v. Blanche Equipment Rentals (B.C.S.C.; 2006)

Facts

- Trevitt initiated a discussion regarding severance
- President said there was still a job available for the plaintiff, however safety concerns relating to injury may mean Trevitt would return in a different capacity
- Trevitt took this as a demotion and claimed that he had been constructively dismissed

Trevitt v. Blanche Equipment Rentals (B.C.S.C.; 2006)

Decision

- *Due to his injuries, Mr. Trevitt has been unable to return to work at Blanche for more than one year. It appears that, although his injuries may not be permanent, Mr. Trevitt would be unable to resume his position as foreman or to work as a heavy equipment mechanic in the foreseeable future. His disability is clearly more than temporary.*

Therefore, considering the severity and likely duration of Mr. Trevitt's disability as well as the key position he held at Blanche, I conclude that his employment contract was frustrated due to his disability.

Questions