

MANAGING DISABILITY AND ABSENTEEISM IN THE WORKPLACE

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Introduction

An employee who is away from work due to illness often causes the employer some degree of frustration, as unexpected absences, whatever the reason, can be detrimental to productivity and efficient operation of the workplace. There are direct costs associated with paid sick leave or other benefits, as well as the difficulty in finding replacement workers. There also exist indirect costs such as reduced service to the community and damage to the morale of other employees who are called upon to cover for absent workers.¹ Employers generally understand that some degree of absenteeism is to be tolerated as a cost of doing business. However, where an employee starts missing an excessive amount of work, his or her absenteeism becomes problematic.

Effectively managing disability and absenteeism in the workplace requires that an employer have the knowledge and the understanding of a myriad of disability-related legal issues arising out of both statutory and common law. Ultimately, addressing attendance issues is typically a two-stage process: (1) finding a way to encourage regular, predictable attendance at work, or if unsuccessful,

¹ *Health Employers Assn. of British Columbia (Re)*, [2002] B.C.L.R.B.D. No. 112 [*Health Employers Assn.*] at para. 5.

then (2) finding a means to terminate the employee's employment so as to free up resources for someone more reliable, without running afoul of the *Human Rights Code*.²

This paper will address the realm of factors to be considered by employers in managing absenteeism in the workplace as well as the employer's obligations pursuant to human rights and workers' compensation legislation. The paper will also address various concerns in relation to the cessation of the employment relationship, namely, the viability of the frustration of contract argument and double recovery issues.

Managing Absenteeism

Employers are entitled to expect regular ongoing attendance from their employees. Poor attendance on the part of an employee is one of the most difficult problems an employer will be required to manage in the context of the employment relationship.

There are essentially two kinds of absences: culpable and innocent/non-culpable. Regardless of whether an employee's absences are culpable or innocent, it is important to have a proactive program in place for addressing and managing absenteeism.

Determining that there is an Absenteeism Problem

In order to determine whether there is an absenteeism problem, an employer may consider doing the following:

1. Identify (through computer reports or other company records) the total number of days off and number of separate instances of absenteeism for each employee within the last one month, three months and 12 months;
2. Identify the worst 10% (or other % below which there is a significant gap) in each monitoring time period (because some employees will be in the worst 10% in one period but not in others);
3. Consider the reasons for absence – one lengthy maternity leave or leave due to a stroke does not merit corrective action even if the employee is in the worst 10%;
4. Consider whether there is a pattern of absences (Fridays, long weekends, etc.); and
5. Deal with the worst cases first, as employees will quickly learn that the employer will not tolerate inexcusable/suspicious absences.

Determining of the Nature of the Absenteeism Problem

CULPABLE VERSUS NON-CULPABLE ABSENCES

In managing absences/attendance, it is appropriate at this stage to delineate between culpable and non-culpable absences. When one speaks of excessive absenteeism, it is not difficult to imagine an employee who regularly calls in "sick" but is unable to substantiate the illness with satisfactory medical documentation. Such employees will frequently undermine employer attempts to confirm any illness by arguing that they were unable to see a doctor on short notice, that they were too ill to

² *Human Rights Code*, S.O. 1990, c. H.19.

leave the house, or that the illness was of a transitory nature. Even where employees can be convinced to provide medical notes, these are typically of questionable value as they tend to be vaguely worded (“...unable to attend at work for medical reasons”), based entirely on subjective opinions (“my patient informs me that...”), and are frequently provided at some date after the purported illness has passed (“...unable to work last Thursday due to...”).

While employees frequently cite personal health problems as the reason for unscheduled absences, the reasons for absences are ever-expanding: weather, traffic, illness of spouse or children, missed alarm clocks, hangovers, scheduling errors, miscommunications about approvals for leave, flooded basement. The list goes on and on. A cursory review of these ‘excuses’ reveals that they can be divided into two groups: culpable and non-culpable absences.

The jurisprudence clearly delineates between culpable and non-culpable absenteeism when it comes to assessing the appropriateness and potentially discriminatory nature of an attendance management program. As discussed later in this paper, different considerations arise under an attendance management policy depending on whether the excessive absences arise as a result of culpable absenteeism or non-culpable absenteeism or both. What is clear, however, is that termination may be an appropriate response to excessive absenteeism irrespective of whether the reasons are culpable or non-culpable.³

COUNSELLING VERSUS DISCIPLINE

As previously noted, a properly structured attendance management policy must account for the differences between culpable and non-culpable absences. Intuitively this makes sense, as most arbitrators agree that employees should not be subjected to discipline where they have not engaged in culpable activities. For the same reasons, any steps along the progression towards termination for non-culpable absenteeism should be equally non-disciplinary in nature. This does not mean that termination for non-culpable absenteeism is not a realistic prospect; however, it must be recognized that different means are necessary to achieve the same end.

The differences in responses to culpable versus non-culpable absenteeism focus on the distinction between counselling and discipline:

It would thus appear from the case law that a counselling letter advising an employee of the concerns of the employer regarding excessive absenteeism and indicating that a failure to improve that record may result in discharge is not, in and of itself, disciplinary in nature. Indeed, it is regarded as a necessary prerequisite to the subsequent exercise of the right to terminate for innocent absenteeism where that is found to be necessary.⁴

An attendance management program which purports to focus on non-culpable conduct must not be discriminatory in essence, as this may constitute discrimination contrary to the *Code*. Even so, just because a series of absences are non-culpable, this does not mean that the employee is incapable of correcting the problem through lifestyle changes, medical treatment, or otherwise. One of the purposes of counselling for non-culpable absenteeism issues is to directly or indirectly encourage the employee to take steps to reduce or ideally eliminate the need for non-culpable absences.

³ *Supra* note 1.

⁴ *Oshawa (City) and C.U.P.E., Loc. 250 (Connor) (Re)* (1996), 56 L.A.C. (4th) 335 (Ontario, Brandt) [*Oshawa*] at 347.

However the policy is structured, it should never be applied in a manner so as to discipline employee absences arising as a result of a disability in the same way as those not related to disabilities. It is well-accepted by arbitrators that a properly designed and administered attendance management policy in no way relieves an employer of its obligations under the Code to demonstrate that it has accommodated to the point of undue hardship.⁵

CULPABLE ABSENTEEISM

Culpable absenteeism encompasses things within the control of the employee that could have been avoided by the employee through the exercise of reasonable diligence and responsibility.

Common examples of culpable absenteeism include absences due to car problems, traffic, sleeping in, hangovers, leaving work without permission, fraudulent applications for sick leave benefits, and failing to notify the employer of an absence. In addition, casual absences that are not supported by medical verification (or satisfactory medical verification) may also be considered culpable where, in the employer's opinion, objectively exercised, such absences are unreasonable (i.e. absences that occur before or after a long weekend).

Culpable absenteeism should be addressed in the same manner as other disciplinary conduct. Accordingly, it should be subject to the normal progressive discipline steps.

STRATEGIES FOR ADDRESSING CULPABLE ABSENTEEISM

Generally, an attendance policy is an effective tool in managing culpable absenteeism problems provided that it is known to employees and is consistently enforced. Such a policy should contain the following:

- **Statements of Attendance Expectations:** The policy should describe the employer's philosophy with respect to sick leave and absenteeism and its commitment to complying with its obligations pursuant to human rights legislation;
- **Reporting Procedure:** The policy should indicate the requirements for notifying the employer of the absence, such as the time frames for reporting the absence, the persons to contact, the contact information, whether the reason for absence must be given and the consequences for not reporting;
- **Medical Certificates:** The policy should request medical certification and/or verification of the absence from a qualified medical practitioner in certain circumstances of absence (e.g. leave of more than 3 days), subject to the terms of a collective agreement (if any);
- **Disciplinary Measures:** The policy should inform employees that the failure to abide by the requirements of the policy could result in discipline, up to and including termination of employment, subject to the employer's obligations under human rights legislation; and
- **Attendance Rewards:** The employer may wish to consider rewarding employees for good attendance.

⁵ *Coast Mountain Bus Co. v. Canadian Auto Workers, Local 111 (Watson Grievance)*, [2004] B.C.C.A.A.A. No. 325 (Gordon) at para. 158.

In the unionized context, any employer rule must comply with the requirements of the *KVP*⁶ decision, or the employer risks having an arbitrator refuse to uphold the rule. In short, a rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. It must be clear and unequivocal.
4. It must be brought to the attention of the employee affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. Such rule should have been consistently enforced by the company from the time it was introduced.

INNOCENT ABSENTEEISM

Innocent absenteeism refers generally to absences due to factors falling outside of the employee's control. Non-culpable absences may be those that flow from a "disability" (as defined in the human rights legislation) or may be caused by periodic/transient, unrelated conditions that would not qualify as a "disability". Also falling within this category are absences permitted by the collective agreement and leaves of absence granted in advance.

(i) What is a "disability"?

A "disability" is generally defined as any physical or mental limitation whether past, present, real or perceived. For example, the definition of "disability" under the *Human Rights Code* reads as follows:⁷

- (a) *any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,*
- (b) *a condition of mental impairment or a developmental disability,*
- (c) *a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,*
- (d) *a mental disorder, or*
- (e) *an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997.*

⁶ *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd.* (1965), 16 L.A.C. 73 (Ontario, Robinson) [*KVP*] at 85-6.

⁷ *Supra* note 2 at s. 10(1).

The Ontario Human Rights Commission sets out the following guidelines to assist with evaluating whether a medical condition constitutes a "disability":

1. Is the condition permanent or ongoing? A temporary condition is not a disability unless it recurs as part of a medical condition.
2. Is the condition so serious that it restricts life's important functions?
3. Is the condition common to the broader public? For example, the common cold, no matter how severe, is not a disability.

(ii) What is the status of transient ailments?

Transient minor ailments do not constitute a "disability". Thus, an employer does not act in a discriminatory fashion if it makes a decision concerning an individual's employment terms or employment status as a result of same.

For example, in the recent decision of *Evans v. Health Care Corp. of St. John's*,⁸ the Newfoundland Court of Appeal ruled that an employer's decision to deny a promotion to an employee because of her excessive use of sick leave was not discriminatory. In a job competition, the employer offered the position to another employee as it believed that Evans' previous use of sick leave would interfere with the roles and responsibilities of the position. Evans had been cautioned in writing on three occasions in respect of her poor attendance record caused by a series of very minor ailments, as well as pneumonia, lung surgeries, a hysterectomy, depression, whiplash, breast surgery, a shoulder injury and stress. The Court of Appeal held that the employee's history of unrelated, short term illnesses and injuries did not meet the definition of "disability", noting:

*[T]ransient illness which may result in an employee accessing available sick leave will not ordinarily constitute a disability, though it may be possible that use of sick leave demonstrates a frailty of health which may result in a disability.*⁹

The Court of Appeal further confirmed that not every injury or illness constitutes a disability:

*[I]t is, I believe, dangerous to simply jump to the conclusion that because someone else who had that same diagnosis was held to have a disability the complainant has a disability. Whiplash, which was one of the injuries the Commission maintained proves the complainant had a disability, is a prime example. It can range from a very mild, slightly irritating, transitory injury to a severe, highly debilitating one. On the mild end of things, it could hardly be said to be disabling.*¹⁰

This case is illustrative of the fact that an employee simply being sick should not necessarily be treated in the same manner as an employee having a disability.

STRATEGIES FOR MANAGING INNOCENT ABSENTEEISM

Employees, pursuant to their employment contracts, have the obligation to provide regular ongoing attendance. Consequently, the employer has the right to be fully informed of the basis for an

⁸ [2003] N.J. No. 61 (C.A.).

⁹ *Ibid.* at para. 26.

¹⁰ *Ibid.* at para. 31.

employee's inability to do so and any work limitations and modifications required in order to have the employee perform his or her job duties. To properly manage absenteeism, it is imperative that the employer take consistent action to enforce its right to receive proper information and notification from the employee. If an employer allows absenteeism to go unchecked, it is very difficult for the employer to assert its rights at a later date.

Regardless of whether the absences are caused by a genuine disability or by transient unrelated problems, the employer has the right to receive information as to what has caused the absence.

(i) Managing the Employee with Transient Ailments

In circumstances where the absences are not related to a disability, the employer may take the position that it is entitled to know the specific cause for the absence, subject to any limitations imposed by privacy or human rights laws. In this instance, the employer should advise the employee that his or her attendance record is unacceptable and that his/her continued employment is in jeopardy if no improvement is forthcoming. The employer should also ask the employee whether it can do anything to assist the employee with his or her return to regular attendance.

In this respect, “transient ailments” are those which are transitory in nature, such as a cold, the flu, intense migraines, etc.

(ii) Managing the Accommodation of Disability

It is well-known that the *Human Rights Code* precludes discriminatory treatment. Where an employee has a disability which affects his or her ability to perform his or her duties, or otherwise affects the employee's ability to regularly attend at work, an employer is required to accommodate the employee to the point of undue hardship. Cases addressing the meaning of “undue hardship” are abundant and beyond the scope of this paper. Nevertheless, it is worth noting at this juncture that the Supreme Court of Canada, in the 2008 decision of *Hydro-Quebec*,¹¹ clarified the limits on an employer's duty to accommodate to the point of undue hardship in the context of an employee whose disability precluded regular attendance:

*The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.*¹²

The Supreme Court further held that the proper threshold for upholding a dismissal in these circumstances was not proof of “a total unfitness for work in the foreseeable future”, but rather:

If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these

¹¹ *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, [2008] 2 S.C.R. 561.

¹² *Ibid.* at para. 16.

circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory. ...

The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.¹³

As a result, the Court concluded that the test is not whether it is impossible to accommodate an employee with a disability (i.e. by virtue of permitting ongoing absences), but rather whether it is impossible to accommodate without causing the employer to suffer undue hardship. Traditional factors considered when assessing whether the employer has met its accommodation obligations include the cost of the proposed accommodation, outside sources of funding (if any), and the health and safety requirements of the position.

With this in mind, it is clear that any attendance management program which seeks to terminate an employee for excessive absenteeism arising from an employee's disability must be structured in a manner that properly considers the employer's obligation to accommodate to the point of undue hardship:

Thus, the effect of the Human Rights Code is simply to add a statutory requirement that must be met before the employer can proceed to terminate the employment, viz, it must if it can accommodate the [disability] to the point of undue hardship and where it cannot, termination is permissible under the doctrine of innocent absenteeism.¹⁴

In the circumstances where the absences are caused by a genuine disability, the diagnosis of same is confidential. However, the employer is still entitled to know what specifically kept the employee from performing his or her duties. For example, an employer does not need to know the specific diagnosis of an employee's back problem. The employer only needs to be advised that back pain kept the employee from being able to perform the job in question.

The following discussion outlines the tools and strategies available to an employer to effectively manage the accommodation challenge posed by innocent absenteeism and to reduce the potential for abuse.

1) Obtain the Required Information

Where the absences are caused by a disability, employers should request information from the employee in writing that not only supports the existence of the disability but also that assists the employer in returning the employee to work. To this end, employers should provide a letter to the affected employee containing the following:

¹³ *Ibid.* at paras. 18-19.

¹⁴ *Oshawa, supra* note 4 at 345.

- Confirmation that the employer is writing to seek information required to address the employee's alleged disability and possible accommodation to permit the employee's return to work;
- Confirmation that it is the employee's responsibility to facilitate the employer's access to this information; and
- A request for the employee's medical advisor to complete an attached questionnaire that is intended to provide the following information:
 - Details of functional limitations;
 - Scope of conflict between functional limitations and the employee's job duties, if any;
 - Projected time limits for persistence of functional limitations;
 - Identification of any treatment needs or medication that will affect, in any way, the work responsibilities of the employee; and
 - The prognosis and expected date of return to work in case of total disability that cannot be accommodate.

The employee has an obligation to cooperate in the accommodation process and, accordingly, has an obligation to provide his or her employer with the relevant and necessary information. In the event the employee and/or attending physician fails to cooperate in the employer's effort to obtain information relevant to the accommodation assessment, employers should again write the employee and/or doctor indicating that the employee is obligated to provide same. The letter should also indicate that the failure to comply with this request may jeopardize the employee's right to accommodation and may result in discipline up to and including dismissal for persistently refusing to provide the information required.

Notwithstanding the employees' obligation to provide the above described information, the Ontario Court of Appeal has awarded punitive damages to an employee who had suffered anxiety and emotional upset as a result of her employer's persistence in contacting her regarding her work-related injury. In *Prinzo v. Baycrest Centre for Geriatric Care*,¹⁵ Prinzo received notice of a layoff. Shortly before receiving this letter, Prinzo had suffered injuries in a slip and fall in her employer's parking lot. She was absent from work for several months and was unfit for any form of work during this period. Throughout this period, her employer persistently urged her to return to work, at one point falsely implying that her doctor had agreed that she was fit for work. Prinzo's lawyer wrote a letter to the employer describing the stress and anxiety that its conduct was causing Prinzo and requesting that all communications be directed to him until further notice.

However, the employer continued to contact the Prinzo directly. On the day of Prinzo's return to work, the employer met with the Prinzo alone for over two hours and, over Prinzo's protest that she was in no condition to address the subject, insisted on talking about termination. Prinzo did not receive formal notice of termination until March 11, 1998, when she was given a letter indicating that her last day of employment would be March 31, 1998. The Trial judge awarded Prinzo damages for harassment and 18 months' pay in lieu of notice, given that she was 49 years old and had been employed by this employer for more than 17 years. On appeal, the notice period was reduced to 12 months, since Prinzo knew well in advance that her employment would soon end, but upheld the award of \$15,000 for the intentional infliction of mental suffering.

¹⁵ (2002), 60 O.R. (3d) 474 (C.A.) [*Prinzo*].

This case highlights the importance of being vigilant when seeking medical information so as to avoid crossing the line and acting in a harassing manner.

2) Cover Your Assets

As employers are required to accommodate their employees to the point of undue hardship, employers should continuously document all management activity and efforts in this regard. In effect, employers should document all initiatives to manage both the access to the information required and employer responses to the employee's noncompliance with his or her responsibility to assist the employer with his or her return to work. This practice will assist an employer in justifying its contention that the accommodation obligation has been frustrated by the employee's conduct. It will also help support any disciplinary or non-disciplinary response to both the failure to provide information and the failure to be available for work.

3) Investigate All Options

Navigating the route to successful accommodation is a formidable challenge for employers as there is no simple or consistent formula for determining the extent to which an employer must go to accommodate. By way of example, subsection 17(2) of the *Human Rights Code* prescribes three considerations in assessing whether an accommodation would cause undue hardship: (1) the cost of accommodation; (2) outside sources of funding; and (3) health and safety requirements.¹⁶ The Ontario Human Rights Commission's Guidelines specifically indicate that such factors as business inconvenience, employee morale, customer preference, and collective agreements or contracts will not be considered in assessing undue hardship.¹⁷

The issue of undue hardship was considered by the Ontario Board of Inquiry in *Kearsley v. St. Catharines (City)*.¹⁸ In this case, the Complainant was offered a position as a fire fighter with the City of St. Catharines, conditional upon passing a medical examination. The City's medical examiner refused to pass him when it was discovered that he had atrial fibrillation. The Complainant subsequently became a fire fighter with the City of Hamilton and filed a complaint against St. Catharines.

At the hearing, the City's doctor testified that atrial fibrillation increased risk of heart failure during the extreme rigours of firefighting; however, the Commission's medical expert suggested that there was no increased risk of heart failure in someone like the Complainant, who was otherwise in good general health. The employer was found to have failed to accommodate the Complainant to the

¹⁶ Similar factors have been considered in other jurisdictions. See e.g. *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B. C. G. S.E. U)*, [1999] 3 S.C.R. 3 and *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, wherein the Supreme Court of Canada enumerated the following factors that should be considered in determining whether or not undue hardship exists: (1) interchangeability of the workforce and facilities; (2) whether the employee's job itself exacerbates the disability; (3) the extent of the disruption of a collective agreement; (4) the effect on the rights of other employees; (5) the effect on the morale of other employees; (6) costs to the employer of the proposed accommodation including impact on efficiency, wage increases and other direct financial costs to be incurred (e.g., renovations); and (7) the impact on the safety of the individual, other employees or the general public.

¹⁷ These factors have also been considered by arbitrators in unionized settings. See e.g. *Re AFG Industries Ltd. and A.B.G. WIU, Loc. 295G (Whitten)* (1997), 68 L.A.C. (4th) 129 (Ontario, Beck) wherein an employee was discharged for excessive absenteeism related to the employee's bipolar disorder. The arbitrator found that the employer had not established undue hardship, as there was no evidence that the employee's absenteeism had been costly, disruptive nor did it have any significant impact on the other employees.

¹⁸ [2002] O.H.R.B.I.D. No. 5.

point of undue hardship by failing to seek out and rely on expert advice when confronted with a medical condition such as this. The Complainant was reinstated, compensated for increased travel and the difference in pay for the interim period, and awarded an additional \$4,000 in general damages.

Similarly, in *L'Archeveque v. Calgary (City)*,¹⁹ the City of Calgary appealed the decision of a human rights panel to the effect that the City had discriminated against an employee because it did not accommodate her physical disability to the point of undue hardship. In this case, the employee stopped work as a data entry clerk in 1996 because of bilateral repetitive strain injury. A gradual return to work was attempted but was unsuccessful. The employee was given modified duties and modified hours. She was put in a different department with part-time hours. Although she applied for other part-time work with the City to maintain full-time hours, she was unsuccessful, in part due to a City policy that did not allow employees to hold two part-time jobs with the City. The City submitted that the employee was medically restricted from working full-time. The Alberta Queen's Bench agreed with the panel's decision that the City failed in its duty to accommodate the employee to the point of undue hardship when it restricted the employee to part-time work.

In light of the above considerations, the cases demonstrate that more will be expected from large employers than from small employers, simply due to the availability of resources and opportunities for accommodation.

The employer should assess and consider all possible accommodation options. The employer should also identify what options most appropriately preserve the employee's rights and dignity. To satisfy the duty to accommodate, an employer should be sure to consider the following:

1. The employee should be accommodated within his or her own position, where possible.
2. Where it is not possible to accommodate an employee in his or her own position, accommodation should be implemented without disturbing rights bargained for under a collective agreement, wherever possible.
3. Ensure that any offer of modified duties does not preclude a more senior employee from performing such duties. Where rights of other bargaining unit employees may be affected, it is important to consult with the Union.
4. It may be necessary to consider positions outside of the bargaining unit, as a last resort.

The above is not intended as an exhaustive list of considerations, but rather provides guidance as to the broadness of the scope of the duty to accommodate.

4) Consult with Relevant Parties

The employee seeking accommodation and his or her union (if any) have a duty to facilitate the accommodation of the employee to permit him or her to work. After securing all the relevant information and assessing all available accommodation options, the employer should consult with the employee and the union (if any) in order to endeavour to achieve a consensus on an option that represents the appropriate accommodation.

¹⁹ [2003] A.J. No. 330 (Q.B.).

This is particularly important where potential accommodation options may affect another employee's rights under a collective agreement.

5) Implement the Initiative

Lastly, the employer should implement the initiative that it considers most appropriate in light of the above considerations (hopefully with the support of all parties).

6) Terminate the Employment Relationship or Treat it as Frustrated

An employee's employment may be terminated or the employment contract may become frustrated due to chronic innocent absenteeism and/or permanent disability. This obligation begs the question: At what point can the employer say: "We've done all we can, but the employee is still unable to perform the required tasks. Can we let him/her go? Is the employment relationship at an end due to frustration?"

In the case of transient illness, employers should not treat the employment relationship at an end unless it is satisfied that there is no reasonable prospect of regular attendance in the future. However, where a disability is causing the absences, the analysis is somewhat different. In that circumstance, the employer has a duty to accommodate an employee's disability to the point of undue hardship.

The following section will address the main factors that employers should consider before taking action to terminate employment or taking the position that the employment contract is frustrated due to chronic absenteeism.

CHRONIC ABSENTEEISM CASES

Where an employer wishes to terminate a disabled employee for excessive absenteeism, the following three-step process applies:

... the Employer must establish that the grievor's record evinces excessive absenteeism, that he is unlikely to be capable of attending work on a regular and consistent basis in the foreseeable future, and that he has been given proper notice that his employment was in jeopardy if his attendance did not improve.²⁰

Under this three-step process, the question of whether a disabled employee can be accommodated to the point of undue hardship arises under the second step regarding the employee's ability to attend work.

In two recent cases before the Canadian Human Rights Tribunal, *Parisien v. Ottawa-Carleton Regional Transit Commission*,²¹ and *Desormeaux v. Ottawa-Carleton Regional Transit Commission*,²² the Tribunal addressed the issue of chronic absenteeism and the employer's obligation to accommodate same. In both cases, the Tribunal ruled that, even if discharge for disability-based absenteeism is upheld by a labour arbitrator, the discharge may still be objectionable on the basis of

²⁰ *Ibid.* at para. 163.

²¹ [2003] C.H.R.D. No. 6 (Hadjis) [*Parisien*].

²² [2003] C.H.R.D. No. 1 (MacTavish) [*Desormeaux*].

discrimination unless the employer establishes that it has accommodated an employee to the point of undue hardship. Both cases involved the termination of bus drivers employed by OC Transpo.

Parisien experienced post-traumatic stress disorder and was absent approximately 1664 full days and 33 part days over a period of 18 years. Similarly, Desormeaux suffered from severe migraine headaches, and was absent for this reason an average of 6.5 full days and 1.25 part days per year over a period of 8.75 years. Both cases went first to grievance arbitration pursuant to the applicable collective agreement for a determination as to whether the termination of the employees' employment was unjust. The arbitration did not deal with whether the individuals had been victims of a discriminatory practice.

The employees subsequently filed complaints with the Canadian Human Rights Commission. The Canadian Human Rights Tribunal found that the employer had not sufficiently explored alternative jobs or other accommodation options and thus reinstated both employees.

PERMANENTLY DISABLED EMPLOYEES

Termination of the employment relationship may also be considered in circumstances where an employee has a permanent illness or disability that make the employment contract impossible to perform. Historically a contract of employment was found to be at an end by reason of frustration if the circumstances existing when the contract was formed subsequently changed so dramatically that further performance of the contract would either be impossible or, if possible, radically different from those that the parties had originally contemplated. This doctrine has been applied in cases where an illness or disability on the part of the employee makes the employment contract impossible to perform.

The basis for the doctrine of frustration was that where an employee had become permanently disabled and thereby unable to perform the duties originally contracted for, it was inappropriate to require the employer to continue the employment relationship or to hold the employer liable for providing notice of termination for what amounted to an Act of God. Indeed, if the medical prognosis is that the employee will clearly remain permanently incapacitated, even a short absence from work may amount to frustration.

However, the concept of frustration of contract becomes increasingly difficult to apply to the modern employment relationship, particularly where the contract of employment contains STD and LTD provisions, as noted by the British Columbia Court of Appeal in *Bohun v. Similco Mines Ltd.*²³ In short, the Courts have found it illogical for an employer to argue that it did not contemplate an employee's long disability-related absence when it provided insurance for same as part of the employment contract. As such, the Courts are reluctant to apply such a concept to the modern employment relationship which provides, for example, STD and LTD provisions, given that employers have anticipated that an employee might become disabled in the course of his or her employment.

Similarly, employees whose contracts have been frustrated by disability may also be entitled to statutory notice and severance under the *Employment Standards Act*.²⁴ Historically, the *ESA* included an exemption from notice and severance where the contract was frustrated by illness or

²³ [1995] B.C.J. No. 1229 (C.A.).

²⁴ *Employment Standards Act, 2000*, S.O. 2000, c. 41 [ESA].

injury. Following a declaration that the exemption was discriminatory,²⁵ the Act was amended and the exemption no longer applies.

Applying the amendments, however, has not been without difficulty. The jurisprudence appears to accept that a determination of frustration is an objective assessment to be done in the circumstances of each case. Where frustration is found, it is clear that the *ESA* contemplates a “severance” of the employment relationship, entitling employees to statutory severance pay (where qualifying criteria, such as years of service and size of the employer’s payroll, are met).²⁶ What is *not* clear, however, is whether an employer can avoid the payment of wages during the statutory notice period by providing the employee (who is off work and possibly in receipt of disability benefits) “working notice” of termination.²⁷

A review of the competing lines of cases on this issue is beyond the scope of this paper. For current purposes, it is sufficient that employers be aware that where they seek to establish that an employee’s contract of employment has become frustrated due to illness or injury, the employer may be required to pay notice and severance under the *ESA*. Similar to workers’ compensation benefits, notice and severance under the *ESA* are statutory benefits which are not subject to mitigation or other forms of deductions or offsets.²⁸

General Strategies for Implementing an Attendance Management Policy

By way of summary, the points below provide a helpful guide to developing and implementing an attendance management policy.

1. Identify Limitations and Restrictions under Collective Agreement

Before implementing any attendance management policy, it is important to first consider the extent of any limitations and restrictions imposed by the collective agreement. This is particularly important where the employer seeks to introduce the policy unilaterally, rather than through direct negotiation with the union, as the union may challenge the policy as being in direct violation of certain terms in the collective agreement. A number of concerns with attendance management policies have been identified by unions as follows:

In the perception of the union and its members, [attendance management policies] may appear to undercut the protection of the collective agreement, for example, by denying employees access to the grievance procedure or depriving them of the benefit of clauses that cleanse their records after the passage of a period of time without further transgression; by depriving them of the full benefit of provisions on

²⁵ *Ontario Nurses’ Assn. v. Mount Sinai Hospital* (2005), 75 O.R. (3d) 245 (C.A.).

²⁶ See, for example, *United Food and Commercial Workers Union Local 175 and Midtown Meats*, unreported (December 6, 2009, McLean) and the cases cited therein.

²⁷ The authorities on this issue are typically divided along one of two lines. One line favours the finding in *MacMillan Bathurst Inc.*, unreported (June 13, 1985, Egan) (E.S.C. 1893) [*MacMillan Bathurst*] that employees are entitled to regular wages during the notice period. The other, less popular line, follows the *St. Joseph’s Health Centre of London (Re)*, [1991] O.E.S.A.D. No. 152 [*St. Joseph’s*] decision which held that an employee earning no wages could be provided with notice without payment of wages during the notice period. Although the amended wording of the *ESA* appears more in line with the *St. Joseph’s* line of cases, employment standards adjudicators tend toward the *MacMillan Bathurst* line, favouring payment of wages to employees, despite the employee’s failure to be actively employed.

²⁸ *Maple Leaf Foods Inc. v. Alejandro*, [1999] O.J. No. 1790 (C.A.).

*matters such as accumulated sick leave and long term disability benefits; or by attaching new conditions of entitlement to those that have been negotiated.*²⁹

To comply with the rule in *KVP*, the terms of any attendance management policy must be carefully construed so as to avoid any interference with existing rights provided to members under the collective agreement. Access to the grievance procedure and the benefits of sunset clauses are traditionally seen as important rights for employees, the denial of which will likely be met with strong resistance.

2. Distinguish between Culpable and Non-Culpable Conduct

It is important to distinguish between culpable and non-culpable absenteeism, as well as the intended response to each type of absence, as it is inappropriate to discipline an employee for conduct that is non-culpable. Instead, where an employee misses work for non-culpable reasons, an attendance management policy must provide for progressive non-disciplinary responses. Though non-disciplinary in the traditional sense, this process will still typify a system of progressive discipline in the sense that:

*... where the circumstances are such that the individual could alleviate his or her attendance problem by changes in attitude or increased commitment to the job, a progressive response may be appropriate even in the context of absenteeism that is due to sickness.*³⁰

Although the arbitral jurisprudence appears to require a non-disciplinary response to conduct that is properly viewed as non-culpable, this does *not* mean employees should not be expected to minimize non-culpable absenteeism. On the contrary, it is accepted that certain types of non-culpable absenteeism can be remedied by the employee, thereby supporting the notion that all employees who are at risk of termination for excessive absenteeism should be given notice of this fact.³¹ If an employee, facing the possibility of termination, fails to take certain steps within his or her control to minimize excessive absences from work, then the employer is far better positioned to justify termination by having provided notice to the employee of the need to make the changes.

3. Determine Threshold of “Excessive”

An employer is entitled to establish a threshold of absences at which it can begin to counsel its employees about their attendance. The threshold may be lower than the average absenteeism rate; however, the employer should disclose to the Union the criteria and thresholds by which attendance is assessed. Further, although the standard used to trigger a review of the employee’s attendance need not be altered to reflect the changing levels of overall absenteeism within the workplace, it is not to be set or applied arbitrarily.

4. Develop Disciplinary and Non-Disciplinary Responses

Where an employee crosses the established threshold for “excessive” absenteeism, the employee should be placed into a relatively predictable series of escalating responses which vary depending on

²⁹ *Health Employers Assn., supra* note 1 at para. 9.

³⁰ *Ibid.* at para. 72.

³¹ *Ibid.* at para. 80.

the culpability of the absence. As noted, appropriate consideration should also be given to the possibility of accommodation where it is revealed that the cause of some or all of the absenteeism arises from the presence of a disability.

Disciplinary responses for culpable absenteeism follow the traditional system of progressive discipline which is likely already set out in the collective agreement. As with discipline imposed for any other reason, consideration should be given to factors such as any representational rights and the possibility that the discipline will become the subject of a grievance.

Non-disciplinary responses should escalate in seriousness similar to a series of progressive discipline; however, they should strive to counsel rather than punish. Commonly referred to as “counselling letters”, written warnings in the context of a non-disciplinary response have been described as follows:

... a counselling letter advising an employee of the concerns of the employer regarding excessive absenteeism and indicating that a failure to improve that record may result in discharge is not, in and of itself, disciplinary in nature. Indeed, it is regarded as a necessary prerequisite to the subsequent exercise of the right to terminate for innocent absenteeism where that is found to be necessary.³²

For example, once the employee reaches the established threshold of an unacceptable number of non-culpable absences, the employee might be required to attend an interview during which the employer’s concerns are communicated and efforts are made to identify any root causes. Subsequent responses could then include:

- Drawing attention to the employee assistance plan, coupled with a suggestion to take advantage of it and an expression of concern;
- Mandatory referral to the plan, along with a warning that continued failure to improve attendance may result in dismissal; and ultimately,
- Dismissal for innocent absenteeism.³³

Any warnings should be documented and provided in writing, but should not read in the same manner as a traditional disciplinary ‘written warning’ or be relied upon for the purposes of progressive discipline:

The process may resemble the more traditional models of progressive discipline in that the expressions of concern escalate in seriousness of tone. The objective is the same, namely to bring about a significant improvement in workplace performance and ensure that the employer gets the benefit of the employment contract. The ultimate result may be the same, in that the employee loses his or her job. However, the process differs from traditional progressive discipline in that the employer does not resort to punitive sanctions. The employee is not subjected, as in the typical

³² Oshawa, *supra* note 4 at 347.

³³ Health Employers Assn., *supra* note 1 at para. 74.

*progressive discipline system, to warnings of punitive actions to come or to a series of suspensions of increasing severity, culminating in dismissal.*³⁴

More generally, the policy should be clear and unequivocal as to when and how it applies, so as to comply with the rule in *KVP*, discussed above. Since discharge is the ultimate last-resort, this possibility must be clearly articulated.

5. Important Inclusions and Limitations

A review of the arbitral jurisprudence with respect to attendance management policies has also revealed a number of elements to include and limitations to be considered when drafting and implementing such policies:

- An attendance policy cannot use absences caused by disabilities to negatively affect an employee unless they are of a sufficient number so as to constitute undue hardship. Examples of negative effects include bumping the employee to a higher stage in the program and triggering or maintaining the employee in the program;
- Attendance expectations should be clearly outlined at the beginning of the policy;
- The policy should expressly define what types of absences are considered culpable versus non-culpable, including a non-exhaustive list of specific examples;
- Leaves properly taken pursuant to the provisions of the collective agreement or the *Employment Standards Act* do not constitute culpable misconduct. Accordingly, the policy might helpfully include broad language indicating that “statutory leaves” are not caught by the policy;
- To dismiss an employee for non-culpable absenteeism, the employer must be able to establish that the employee’s past absenteeism is excessive and that there is no reasonable prospect of improvement for the future;
- An employer is not permitted to mathematically apply threshold targets without providing for the exercise of discretion at each step of the policy;³⁵
- It is unreasonable to demand that employees provide a medical certificate for all future absences;³⁶
- It is further unreasonable to require employees to provide medical certificates for all future absences simply because the employee has crossed a certain threshold of absenteeism;³⁷
- The policy must respect the confidentiality of the employee’s medical information;
- The policy must make clear that termination is an absolute last resort; and

³⁴ *Ibid.* at para. 75.

³⁵ *Ottawa Hospital v. Canadian Union of Public Employees (Myre Grievance)*, [2011] O.L.A.A. No. 132 (O’Neil) [Ottawa Hospital] at para. 74.

³⁶ *St. Joseph’s*, *supra* note 27 at 122.

³⁷ *Ibid.*

- The policy should provide for union representation rights at a certain point, but need not provide for such rights during the initial, informal steps of the program (unless required by the collective agreement).

6. Consult with the Union

Before the policy is implemented, the Union might be given an opportunity to review and offer comments or suggestions. Although it is not a prerequisite for the Union to give its stamp of approval, consulting with the Union and seeking its support can go a long way in developing and maintaining labour relations stability. In doing so, it is often prudent to discuss with the Union the impact that excessive absenteeism is having on efficient operations as well as the steps the employer has proposed to minimize any disruption to the terms of the collective agreement.

7. Implement the Policy

Where the policy is not negotiated between workplace parties, it is important to comply with the rule in *KVP*, as outlined above. In particular, it is critical that the policy is brought to the attention of the employees and the Union, and that it is applied consistently and fairly. Notwithstanding, it may be necessary to grant some leeway until employees understand the new rules.

Insurance and Double Recovery Issues

The provision of disability insurance benefits for employees has significantly impacted the law relating to entitlements on termination of employment. The following is a review of some of the significant concerns arising out of the provision of insurance coverage benefits to employees.

Non-union employees dismissed without cause and without reasonable working notice are entitled to damages equal to their salary and benefits during the notice period. Where the employee is disabled at the time of termination, the issue arises as to whether disability benefits to which the employee is entitled during the notice period may be deducted from such damages? Certainly, had the employee continued to be employed, then the employee would only have been entitled to either salary continuation or benefits, and never both at the same time.

The leading case on the issue of double recovery is the Supreme Court decision in *Sylvester v. British Columbia*.³⁸ That decision appears, in part, to follow the "logic" that employees should not be entitled to collect disability benefits and salary/wages for the same period of time. In this case, a B.C. government contract employee's employment was terminated during a period when he was receiving disability benefits that were self insured by the employer. The Supreme Court ruled that the employee could not receive both disability benefits and damages for wrongful dismissal for the same period of time. However, the Court did note the following:

There may be cases where an employee will seek benefits in addition to damages for wrongful dismissal on the basis that the disability benefits are akin to benefits from a private insurance plan for which the employee has provided consideration. This is not the case here. It is not in dispute that the respondent did not make any contributions to the STIP or the LTDP. The issue whether disability benefits should be deducted

³⁸ [1997] 2 S.C.R. 315 [*Sylvester*].

*from damages for wrongful dismissal where the employee has contributed to the disability benefits plan was not before the Court.*³⁹ [Emphasis added]

Unfortunately, the lower courts have not always adopted this "logic" to preclude double recovery. Indeed, the Ontario Court of Appeal relied on the aforementioned statement to distinguish *Sylvester* in its decisions in *McNamara v. Alexander Centre*⁴⁰ and *Sills v. Children's Aid Society of the City of Belleville et al.*⁴¹ In these cases, the Court of Appeal allowed the wrongfully dismissed employees to "double dip" and receive both damages in lieu of notice and LTD benefits. In both cases, the disability benefits were paid by third party insurers, not the employer. However, the employer paid all of the benefit premiums.

In *McNamara*, the Court of Appeal was faced with a situation where the plaintiff, a chartered accountant, was terminated from his employment as President of Finance when he advised that he required time off indefinitely for medical reasons. The employee had specifically negotiated full benefits in exchange for a lower salary at the time he was hired due to his wife's health problems. The employer paid all of the premiums. The Court of Appeal noted that the case differed from *Sylvester* in that an independent third party insurance carrier provided McNamara's disability benefits. Moreover, McNamara had indirectly provided consideration for the benefits since, at the time he was hired, he had foregone a larger starting salary in exchange for a full benefits package.

In *Sills*, a social worker was given 14.5 months working notice of termination and was offered an additional 3.4 months severance pay on termination. Within 2 months of receiving notice, Sills suffered from depression and was unable to work during the rest of the notice period. She received short term disability payments from the group insurer plus a top-up from her sick-leave bank. Later she received long-term disability benefits and sued for wrongful dismissal. The trial judge found that the proper notice period was 19.4 months and credited the employer with 2.5 months which Sills worked after receiving notice. The Court found that Sills had earned the disability benefits as part of her compensation package and, in the absence of a contrary intention, the disability benefits could not be deducted from the reasonable notice damages because Sills had contributed to the plan. The Court stated that an employer is not relieved of its obligation to pay damages for wrongful dismissal by virtue of the existence of a disability plan. The Court applied *Sylvester* and held that there was no evidence that the parties did not intend employees to be entitled to both damages and disability benefits. The Court of Appeal approved the trial judge's finding that the plaintiff made a nominal indirect contribution to premiums required to fund the plan by providing for her employer an Employment Insurance premium reduction because she was a beneficiary of a disability policy. The Court of Appeal also approved the trial judge's finding that the plaintiff earned the disability benefits "as part of her compensation and as part of a tradeoff in arriving at benefits and salary" based upon the plaintiffs uncontradicted evidence at trial.

Encouragingly, *Sills* and *McNamara* were recently considered by the Ontario Superior Court of Justice in *Kolaczynski v. Benz Sewing Machines Ltd.*⁴² In this case, an employee's remuneration, job description and perks were unilaterally changed by his employer. As a result, the employee went on medical leave for depression and began receiving long-term disability benefits. He sought damages against the employer for constructive dismissal. The trial judge allowed the constructive dismissal

³⁹ *Ibid.* at para. 22.

⁴⁰ (2001), 53 O.R. (3d) 481 (C.A.) [*McNamara*].

⁴¹ (2001), 53 O.R. (3d) 577 (C.A.) [*Sills*].

⁴² *Kolaczynski v. Benz Sewing Machines Ltd. (c.o.b. B&W Sewing Machine Co.)*, [2002] O.J. No. 1117 (Sup. Ct. J.) [*Kolaczynski*].

claim and awarded the employee 15 months salary in lieu of notice. In considering whether the employee's disability benefits were to be deducted from the wrongful dismissal damages, the Court ruled that there was no evidence of direct or indirect contribution on behalf of the employee and thus the disability payments were deducted from the damages.

In light of the above, it is unclear where the issue of double recovery presently stands. Although the decisions in *Sills* and *McNamara* do not go to the extent of creating situations whereby employees will necessarily be entitled to both damages for wrongful dismissal damages and disability benefits during the reasonable notice period, these cases do indicate that employees may be entitled to "double dip" and receive both damages in lieu of notice and disability benefits where the disability benefits are paid by third party insurers and where they are provided as part of the compensation negotiations, even when the employer paid all of the benefit premiums.

In our opinion, these cases are concerning, as the decisions are arguably based on a misapplication of "employee contribution exception" set by the Supreme Court of Canada in *Sylvester*. We can only hope that more cases, like *Kolaczynski*, will be confirmed as the jurisprudence on this issue develops.

Workers' Compensation Issues

The issue of workers' compensation may also come into play in managing absences due to disability in the event an employee's disability is the result of a workplace injury. For example, in the Province of Ontario, it is important to recognize that the *Human Rights Code's* definition of disability includes an injury for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*.⁴³ The workers' compensation system is very complex and could easily be the subject of a separate paper. However, we will briefly outline below some of the employer's obligations in respect of leaves under the *WSIA*.

Leave on the Day of Accident

The first type of leave that the worker may be entitled to when an accident occurs in the workplace is the rest of the day off with pay on the day of the accident. Indeed, if the worker is unable to complete his or her scheduled hours of work because of a workplace injury, the employer is responsible for paying the wages and benefits that would have been earned for the day/shift on which the injury occurred.

Leave Until Fit to Return to Work

Furthermore, injured employees are entitled to remain off work until they are fit to return to work. However their individual right to reinstatement is limited under subsection 41(7) of the *WSIA*, which indicates that the employer's duty to reinstate the injured worker ends at the earliest of the following:

- (a) the second anniversary of the date of injury;
- (b) one year after the worker is medically able to perform the essential duties of his or her pre- injury employment; and
- (c) the date on which the worker reaches 65 years of age.

⁴³ *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, s. 41 [*WSIA*].

Facilitating a Return to Work

The primary focus of attendance management policies is the minimization, or ideally elimination, of unnecessary and excessive absenteeism. At a bare minimum, such policies are designed to provide some recourse to employers to deal with excessively absent employees. Hand-in-hand with the minimization of absenteeism is the need for returning employees to work where the reason for the absence is health-related. Facilitating an employee's return to work is not always an easy task, but it is a necessary one.

From a practical perspective, returning employees to work minimizes workers' compensation claims/costs, short term disability and long term disability claims, often providing the employer with a corresponding reduction in premiums. Specifically with respect to workers' compensation, the WSIA now imposes a positive obligation on employers to facilitate an employee's return to work where such return would not cause the employer to suffer undue hardship.⁴⁴ This ties in exactly with the employer's human rights obligation to accommodate an employee to the point of undue hardship.⁴⁵

From a health and safety perspective, and particularly with respect to police officers, an employer must exercise caution in returning employees to work. The employer must be satisfied that the employee is reasonably fit to perform his or her assigned duties in a manner which is not likely to affect the health and safety of any of its employees, as well as the safety of the public and its property.

In *Chatham-Kent (Municipality)*,⁴⁶ a firefighter was returned to full duties following a workplace injury. Several months after his return to work, the WSIB learned that the employee suffered from a permanent impairment which precluded the employee from engaging in climbing, squatting and repetitive movement of one knee. As a result, the employer removed him from service and requested that he provide a functional abilities evaluation (FAE) from the WSIB. Although the employee, through the union, provided five medical certificates clearing the employee for full duties, the employer refused to consider these for the purposes of returning the employee to work. The arbitrator found the employer's decision to remove the employee from service to be reasonable, but held that the employer was unreasonable in its refusal to consider the medical certificates. This case demonstrates the employer's responsibility to ensure fitness of employees for work, as well as addressing the employer's responsibility to review and consider all information demonstrating a fitness to return.

Although a detailed review of the law in this area is beyond the scope of this paper,⁴⁷ practically speaking, one should consider the following when facilitating an employee's return to work:

- The focus of return to work exercises is on the cooperation of both the employer and the employee in facilitating the employee's return to work;

⁴⁴ *Ibid.* at s. 41.

⁴⁵ *Supra* note 2 at s. 17.

⁴⁶ *Chatham-Kent (Municipality) v. Chatham-Kent Professional Fire Fighters' Assn. (Horton Grievance)*, [2008] O.L.A.A. No. 253 (Ontario, Kaplan).

⁴⁷ For a more thorough review, please see Keenan, M. Elizabeth, *Medical Information: How Much and When?*, Police Association of Ontario 2011 Police Employment Law Conference.

- As a part of this cooperative effort, the employee has an obligation to provide sufficient medical documentation so as to permit the employer to consider its workplace and properly explore what tasks may be available to the injured/disabled worker;
- Even so, where the employer is aware that an employee has a disability requiring accommodation, the employer is obligated to consider how the employee can be accommodated to the point of undue hardship;
- Where an employee requests to return to work after being absent due to illness or injury, the employer may seek out a medical certificate to satisfy itself as to the fitness of the employee, the employee's ability to carry out assigned duties efficiently and safely, and whether there is any need for modified work;⁴⁸
- The employer should only seek medical information from the employee which is reasonably necessary to facilitate the employee's return to work.
- Any employer right to medical information may be limited by the terms of the collective agreement, but in any event will still be governed by a general standard of reasonableness. As with attendance management policies, while the terms of a collective agreement may provide that the employer has the right to request medical documentation to substantiate every health-related absence, some arbitrators refuse to uphold this right at arbitration;⁴⁹
- The employer should use the least intrusive means possible to secure the requisite medical information;
- Although the employer should be thorough and diligent in seeking sufficient information in the return to work process, the employer should not conduct itself in such a way as to be seen to be harassing the employee; and
- A good faith insistence on receiving reliable medical information to substantiate the extent of an employee's disability will generally not constitute harassment contrary to the Code, although the nature of the necessary information will vary on a case-by-case basis.⁵⁰

The above are merely examples of the workers' compensation obligations that should be considered in the management of disability and absenteeism in the workplace. As mentioned above, the workers' compensation scheme is very complex and, as a result, many employers struggle with the management of these claims in the same way that they struggle with management of other cases of absenteeism. The existence of workers' compensation absences often lead employers to seek advice accordingly before taking action to address attendance and other issues arising as a result of a compensable work-related illness or accident.

Conclusion

Managing disability and absenteeism in the workplace requires knowledge of an entire realm of disability-related legal issues that arise out of both statutory and common law. As mentioned, the management of disability and absenteeism often requires an employer to consider the implications

⁴⁸ *Firestone Tire & Rubber Co. of Canada Ltd. and United Rubber Workers, Local 113* (1973), 3 L.A.C. (2d) 12 (Ontario, Weatherill).

⁴⁹ *St. Joseph's*, *supra* note 27.

⁵⁰ *McMahon-Ayerst v. Revera Long Term Care*, 2009 HRTO 645 (CanLII) (Muir).

of human rights and workers' compensation legislation as well as issues of frustration of contract and double recovery.

A review of the case law reveals that attendance management policies are acceptable, so long as they are sufficiently flexible to allow an employer to consider circumstances unique to each individual. Where expectations are clearly set out, and the policy is consistently and fairly applied, attendance management policies are a useful way to curb excessive non-culpable absenteeism. Where the absences are a direct result of a disability, termination is still a realistic prospect. However, the employer still must be sure it is acting in compliance with its duty to accommodate to the point of undue hardship.

In circumstances where the employer is taking active steps to return an employee to work, the employer must be careful not to overreach when requesting medical information from the returning employee, and must further ensure that it is not unreasonable in refusing to consider provided information.

Overall, it is essential that employers understand that, although they may satisfy their obligations in relation to one legal scheme, they may still have other liabilities and unsatisfied obligations in regards to another.



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