



Evans, Philp LLP
Barristers and Solicitors

Breakfast Series:
**Attendance in the
Workplace:
Tips for Managing
Employee Absenteeism**

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Attendance in the Workplace: Tips for Managing Employee Absenteeism

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When is employer intervention appropriate?

- When employer has a concern
- Employer pitfalls:
“I can’t intervene given the circumstances.”

When is employer intervention appropriate?

- The key question is not:
“When is employer intervention appropriate?”
- The key question is:
“What considerations should guide employer intervention?”

What considerations should guide employer intervention?

- What are the organization's needs and attendance goals?
- Considerations:
 - tolerance for absences
 - absenteeism rates in different industries
 - production targets
 - staff morale

What considerations should guide employer intervention?

- Legally permissible attendance goals:
 - maximize overall level of attendance to support objectives of organization
 - minimize overall level of absenteeism
 - deal proactively with individual absences

What considerations should guide employer intervention?

- Perfect attendance not the objective
- Employee entitlements to “protected” absences:
 - under statute
 - under collective agreements
 - arising from duty to accommodate

What considerations should guide employer intervention?

- Attendance Management Programs are *prima facie* legitimate

“There is nothing wrong with management acting in a prospective manner and putting in place a system which is designed to efficiently manage short term absenteeism.”

Air Canada v. CUPE 2002 (Foisy)

Attendance Management Programs

- Legal requirements of attendance management programs:

Lumber and Sawmill Workers Union, Local 2537 v. KVP Co. Ltd. (1965) (Robinson)

Attendance Management Programs

- Attendance Management Programs must not:
 - be inconsistent with legislation
 - be inconsistent with the collective agreement
 - be applied mechanically
 - be disciplinary (when dealing with innocent absenteeism)

Attendance Management Programs

- Attendance Management Programs must:
 - be reasonable
 - be provided to employees on notice
 - be clearly understandable to the employee
 - be applied consistently

When will attendance management program be unenforceable?

- Arbitrary standards for absenteeism

“A standard of a reasonable level of innocent absenteeism cannot exist in a vacuum.”

St. Joseph's Hospital, Elliot Lake (2006) (Luborsky)

When will attendance management program be unenforceable?

- Mechanical application of program without consideration of individual circumstances

“No deliberate consideration whether the cause of the current absence was an extraordinary event.”

Coast Mountain Bus (2003)(Dorsey)

Summary: Terms of reference for attendance management programs

- fair and reasonable
- consistent with statute and collective agreement
- provided on notice to employees
- applied consistently
- applied with discretion and not mechanically
- non-disciplinary

Culpable vs. non-culpable absenteeism

- The culpable/non-culpable distinction is crucial to an effective absenteeism management program
- Ignoring this distinction creates a risk of liability under the *Human Rights Code* and/or the collective agreement and/or at common law

Culpable vs. non-culpable absenteeism

Culpable conduct = conduct that is **blameworthy**

Non-culpable conduct = conduct that is **innocent** (i.e. not blameworthy)

Culpable vs. non-culpable absenteeism

“The first basic principle is that innocent absenteeism cannot be grounds for discipline in the sense of punishment for blameworthy conduct. It is obviously unfair to punish someone for conduct that is beyond his control and thus not his fault.”

Massey-Ferguson Ltd. (1969) (Weiler)

Culpable vs. non-culpable absenteeism

The following do **not** warrant disciplinary action:

- absences due to *bona fide* illness/injury;
- non-performance or poor performance arising from inability to perform all required tasks due to health condition
- any circumstance not involving fault or dereliction of duty on the part of an employee

Culpable vs. non-culpable absenteeism

- This does not mean that employees with *bona fide* medical conditions are immune to discipline if they engage in **misconduct**
- Indeed, discipline may be warranted even if such employees engage in **misconduct** that is absenteeism-related

Culpable vs. non-culpable absenteeism

Some instances where discipline for absenteeism-related **misconduct** *may* be warranted:

- failure to comply with employer's call-in procedures
- failure to respond to reasonable requests for medical updates to substantiate continued absence
- leaving work early without permission or proper notification
- refusal to attend meeting under absenteeism management program

Culpable vs. non-culpable absenteeism

- However a lack of misconduct does not mean employer cannot or should not act to address an employee's **innocent** absenteeism
- There are a variety of potential **non-disciplinary responses** to innocent absenteeism
- What constitutes an appropriate response depends upon **the specific facts and circumstances**

Culpable vs. non-culpable absenteeism

Possible non-disciplinary responses to **innocent** absenteeism include:

- **counselling** to remind employee of attendance expectations and of concerns related to his/her absenteeism level
- **altering** job duties or work assignment
- **terminating** employment (but only in extreme cases involving frustration of contract)

Culpable vs. non-culpable absenteeism

“...a counselling letter advising an employee of ... concerns...regarding excessive absenteeism and indicating that a failure to improve...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.”

Oshawa (City) and CUPE, Local 250 (1996)(Brandt)

Absenteeism and employee entitlements under the *ESA*

- *ESA* entitlements to:
 - vacation (s.33)
 - pregnancy leave (s.46); parental leave (s.48)
 - family medical leave (s.49.1)
 - emergency leave (s.50)
- Attendance Management policies must not infringe right to absences “protected” by statute

Absenteeism and employee entitlements under the *ESA*

- Counting statutory emergency leave days in attendance program constitutes prohibited reprisal under s.74(1), *ESA*

Natrel vs. Teamsters Local 647, (2004) (Swan)

Absenteeism and employee entitlements under the *ESA*

- Option to buy way out of attendance program using vacation days improper

“The Employer must refrain from encouraging employees to forego sick leave in favour of other entitlements (vacation, floating holidays, leaves of absence, etc.) in order to avoid the application of the program.

Toronto Hydro (2003) (Saltman)

Absenteeism and employee entitlements under the *ESA*

“...an attendance scheme violates the Employment Standards Act if it is designed to dissuade employees from exercising their statutory right to Emergency Leave.”

Fleetwood Canada Ltd., (2005) (Knopf)

Absenteeism and employee entitlements under the *ESA*

- Summary:

Where provision of attendance policy dissuades employees from exercising statutory right to be absent, provision will constitute reprisal under *ESA* and provision or entire policy will be unenforceable

Impact of the duty to accommodate

- The *Human Rights Code* in Ontario requires employers to accommodate employees with disabilities
- The standard of accommodation is “*undue hardship*”

Impact of the duty to accommodate

“...absences for reasons arising out of a disability under the Code cannot be relied upon to justify termination of employment for innocent absenteeism unless there has been accommodation by the employer for this disability to the point of undue hardship.”

Corporation of the Town of Ingersoll (2003) (Williamson)

Impact of the duty to accommodate

- The *undue hardship* standard is vague and may be difficult to apply
- However, a recent case suggests that the workplace parties may be entitled to define, in advance, some aspects of what constitutes *undue hardship*

Impact of the duty to accommodate

...although a clause providing for termination of the employment relationship after a specified period is not determinative, it does give a clear indication of the parties' intention with respect to reasonable accommodation... such a clause can serve as evidence of the maximum period beyond which the employer will face undue hardship.

McGill (2006) SCC

Impact of the duty to accommodate

- The precise nature or extent of what is required by an employer to fulfill its duty to accommodate must be assessed on a case-by-case basis
- Each case turns on its own particular facts
- The duty to accommodate is ongoing and requires continual re-assessment as the situation unfolds

Impact of the duty to accommodate

The importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made.

McGill (2006) SCC

Impact of the duty to accommodate

- Keep in mind the employee's duty to assist and act reasonably:

“The test of reasonableness is not subjective to the employee. The litmus test is not whether the employee gets what he or she wants. Rather, the employer must demonstrate on the basis of the actual facts, it made every possible effort, up to the point of undue hardship, to assist the employee...”

Kamloops (2007) (Holden)

Impact of the duty to accommodate

- Addictions present a special challenge for employers

“It may be too much to expect an alcoholic employee never to relapse....Therefore, accommodating an alcoholic employee may demand allowances for a relapse.... But it would be inappropriate to conclude that every relapse should be accommodated. That would clearly be a wrong-minded approach.”

Uniroyal Goodrich Canada Inc.(1999)(Knopf)

Impact of the duty to accommodate

“...[the employee had a duty] to facilitate the accommodation process...[he]... relapsed and ... failed to take the necessary steps to address that relapse...Addiction, as a treatable illness, requires an employee to take some responsibility for his rehabilitation program... [he] failed to discharge that duty, and the duty to accommodate was exhausted.”

Health Employers Assn. of British Columbia (2006)(BCCA)

Summary

- The challenges:
 - managing attendance issues is not easy
 - the undue hardship standard is vague
 - the *ESA* adds a level of complexity
 - employee rights are extensive

Summary

- Best practices...
 - remember attendance policies are *prima facie* valid
 - understand culpable /non-culpable distinction
 - understand *ESA* “protected” absences
 - impose discipline where warranted
 - respond appropriately to non-culpable conduct
 - hold employees to their employment obligations

Future Breakfast Seminars – Please Join Us

- Mark your calendar...
 - **Tuesday, February 26, 2008**
 - **Tuesday, May 27, 2008**

Thank you for coming!