Illness and Absenteeism Newsletter – March 2019, Edition

Welcome to the latest issue of our newsletter. You have received this monthly newsletter because you either signed up for our electronic newsletter, purchased a copy of our resource manual, or are engaged in the human resource or labour relations field.

This newsletter addresses illness and absenteeism. It is designed to communicate relevant and timely decisions of interest to human resource personnel, union representatives and labour relations practitioners across Canada. It is written by Denny Kells, author of the looseleaf manual Illness and Absenteeism. Information regarding that publication is set forth at the end of this newsletter.

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If you have any questions or suggestions regarding our newsletter, please contact us by e-mailing denny@illnessandabsenteeism.com.

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A. Featured Case: In the absence of a statutory definition of "mental disability", an arbitrator was prepared to accept both medical and non-medical evidence, including evidence of a hearsay nature, in order to establish that the employee suffered from a mental disability.

In *Langley Senior Resources Society*, 2018 BCHRT 59 (CanLII) (Ohler), the employee had allegedly been terminated because of issues with her management style, her errors in administration, and "several mistakes and issues" pointing specifically to two alleged problems with two specific employees. The employer also contended that it was unlikely that the employee would have been renewed beyond the expiration of her six month probationary period.

The essence of the employee's complaint was that her mental disability had been a factor in her termination as the employer's Executive Director. She contended that several of the operational issues attributed to her were evident at the time that she assumed her position.

The employee's starting salary was $105,000, with that salary to be increased to $110,000 following completion of her six month probationary period. The contract of employment also provided for 84 hours of sick leave per year. Approximately five months into her employment, the employee placed herself on sick leave. Her email to the employer stated that "the last 2 to 3 months of relentless bullying have finally caught up with me – I am simply burned out."

The employee filed a WCB claim for health care and wage loss benefits related to "a mental health disorder" linked to bullying and harassment in the workplace

Approximately 3 ½ months after having left on sick leave, the employee advised that she was ready to return to work. At the employer's request, the employee provided a doctor's certificate confirming that she could return. A return to work date was established for a date that was approximately four months after the start of her sick leave.

On the date that she was to return, the employee reportedly had a "panic attack" while her husband was driving her to the employer's premises. As her husband drove away, the employer presented her with a letter of termination on the front steps of the building. It advised her that it was giving her notice of termination pursuant to the four week notice provision set forth in her employment contract. Her final pay and record of employment were to be provided within a week, with her medical benefits continuing until the end of that month.

The adjudicator began by considering whether the employee had a mental disability. She noted that the employer had not taken issue with the employee having a mental disability – but rather its concern was that the employee had not communicated her disability to the employer. The employer's counsel had not cross-examined the employee on the issue. Rather, his questions

were consistent with the employer's earlier position regarding the employee's alleged failure to provide her employer with notice of her disability.

The adjudicator stated that if she had considered the employer's argument that the employee did not have a mental disability, she would have done so only in the alternative:

> If I did consider the Society's argument, I would only do so in the alternative. The Code does not define what constitutes a physical or mental disability. In *Morris v. BC Rail*, 2003 BCHRT 14 (CanLII), para. 214, the Tribunal set out the following considerations for assessing whether an individual has a disability:
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> - the individual's physical or mental impairment, if any;
> - the functional limitations, if any, which result from that impairment; and
> - the social, legislative or other response to that impairment and/or limitations
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> assessed in light of the concepts of human dignity, respect and the right to equality.
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> Medical evidence is not the only basis on which a mental disability can be proved. I am entitled to consider the whole of the evidence on this issue: *Miscisco v. Small et al*, 2001 BCCA 576 (CanLII), para. 2.
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> [The employee] gave evidence about the symptoms she experienced immediately before and during her medical leave, together with the lasting impact of her conditions on her, and I accept that evidence. Significantly, she testified that on her way to work on the day scheduled for her return, she suffered a panic attack at the thought of what may await her at the workplace.
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> In addition, however, it is undisputed that [the employee] was on medical leave from her employment with the Society for a number of months. There is also documentary evidence regarding her interactions with WCB during and after her medical leave with regard to her mental health diagnosis and treatment, including notes of the conversation between WCB and [the Executive Director that subsequently replaced the employee] where [he] asked a number of questions about [the employee's] diagnosis and treatment. That documentary evidence establishes that [the employee] was diagnosed with a DSM 5 psychological disorder caused by work-related stressors resulting in her inability to attend work as of March 5, 2015. The fact that her diagnosis was made after her dismissal is irrelevant as the psychologist attributed the cause to work conditions.
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> While the notes in the WCB file recording the diagnosis may be considered hearsay, I am entitled to accept hearsay evidence (s. 27.2(1) of the *Code)*. That section states:
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> > 27.2 (1) A member or panel may receive and accept on oath, by affidavit or otherwise, evidence and information that the member or panel considers necessary and appropriate, whether or not the evidence or information would be admissible in a court of law (emphasis added).
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> In the circumstances here, where the Society held out that the issue of [the employee's] mental disability was not in dispute and suddenly reversed its position, I find I am entitled to accept and rely on that hearsay as a matter of necessity to make the finding that I have made. I find that the medical evidence contained in

> the record of another tribunal expressly charged with awarding compensation for mental distress arising out of and in the course of employment is sufficiently reliable, and therefore appropriate, for me to consider. I also find my approach is not inconsistent with the principled test of necessity and reliability for the admission of hearsay described by the Supreme Court of Canada in *R. v. Khan*, 1990 CanLII 77 (SCC), [1990] 2 S.C.R. 531.

The employee was found to have had a mental disability. Her termination constituted an adverse impact. The adverse impact was compounded by the manner of termination. The remaining question was whether the employer knew or ought to have known of the disability. The adjudicator answered that question in the affirmative:

> I am satisfied on a balance of probabilities that the Society knew or ought to have known of [the employee's] disability at the time it decided to terminate her employment. The Society's knowledge of the circumstances surrounding [her leave] together with the duration of the leave and other factors mentioned above would have signalled to any reasonable person that [the employee] had a mental disability … I find that the Society was sufficiently aware of [her] disability, in the words of *Gardiner* [*Gardiner v. Ministry of Attorney General*, 2003 BCHRT 41 (CanLII)], "to believe that there [was] some question regarding a possible adverse effect of [the employee's] medical condition on [her] ability to do the work" so as to ask for a medical note clearing her return to work.

On the issue of whether the employee's disability or the employer's perception of it was a factor in the termination, the adjudicator commented that none of the employer's concerns rose to the level of a performance issue. The adjudicator also stated:

> I do not need to decide whether [the employee] was a good or bad Executive Director, nor even whether the Performance Allegations were legitimate. Rather, [the employee] need only persuade me on a balance of probabilities that her termination was related, in whole or in part, to her disability … The disability need not have been the sole or even the primary factor, as long as it was a factor … On a balance of probabilities, I am satisfied that in this case that it was.

The adjudicator then considered whether the employee's disability or the perception of her disability was a factor in her termination:

> I now turn to the question of whether [the employee's] mental disability was a factor in the Society's decision to terminate her employment. She stated that "the Society's knowledge of the circumstances surrounding [her] leave together with the duration of the leave and other factors mentioned above would have signalled to any reasonable person that [the employee] had a mental disability."

The adjudicator awarded $30,000 for injury to dignity. An award of costs was refused. The issue of wage loss was bifurcated from the hearing "on application and by consent of the parties." The parties were to contact the Tribunal to arrange for a schedule of submissions on that issue.

Issues related to the establishment of a disability are considered in s. 14:300 of the *Illness and Absenteeism* manual and its supplement.

B. Recent Decisions of General Interest

1. An employer's drug and alcohol testing protocol was upheld where more than 90% of the positions in the bargaining unit were considered to be safety sensitive.

In *British Columbia Hydro and Power Authority*, 2018 CanLII 69598 (BC LA) (Hall), the union filed a policy grievance challenging the employer's unilateral implementation of pre-employment drug and alcohol testing for all individuals applying for safety sensitive positions.

The union likened this form of testing to random drug and alcohol testing, and submitted that the applicable arbitral standard was set forth by the Supreme Court of Canada in *Irving Pulp and Paper Ltd.*, [2013] 2 S.CR. 458; that is "the Employer must demonstrate a drug and alcohol problem in the workplace sufficient to justify the practice. The employer's position was that it need only demonstrate that the policy is reasonable under the *KVP* principles and [was] not discriminatory."

It was agreed that pre-employment testing was subject to arbitral scrutiny based on the hiring hall provisions in the parties' collective agreement.

It was also agreed that in excess of 90% of the positions in the union's bargaining unit were considered to be "safety sensitive". All candidates for employment were subject to a pre-access drug and alcohol test. Other than as part of a return to duty treatment or monitoring program, the employer did not conduct any unannounced or random drug testing for drugs or alcohol.

In the context of reviewing the arbitral decisions, the arbitrator stated:

> If the testing of existing employees as a pre-condition to employment in a safety sensitive position is reasonable under the balancing of interests approach, then it is my view that the pre-employment testing of job candidates is even more defensible – subject to other components of the policy under examination … Unlike internal applicants, external candidates are not typically known to the hiring employer; nor do they have the same seniority rights and other protections under the collective agreement. On the other side of the equation, the hiring employer has a legitimate interest in ensuring that prospective employees are fully medically fit to work in a safety sensitive environment. There is additionally a reduced expectation of privacy where potential candidates are told in advance of the prevailing hiring standards.

The union had not "identified any other means by which persons with potential substance abuse problems that would create a safety risk might be identified; i.e. there does not appear to be any less intrusive means of fulfilling the Employer's objective."

The arbitrator stated:

> In all of the circumstances, I am satisfied the Employer's pre-employment testing practice in its entirety is a proportionate response and meets the balancing of interests test. Without repeating all of the relevant considerations, the circumstances include the period of advance notice; the fact that a positive drug test does not result in automatic disqualification for employment, and, the determination of a candidate's medical fitness is based on an individual assessment.

The union had argued in the alternative that the pre-employment testing requirement discriminated against prospective employees who were addicted or perceived by the employer to be addicted in that employees who tested positive were effectively denied employment. The arbitrator ultimately concluded that

> The employer's practice of requiring pre-employment drug and alcohol tests is, in all of the circumstances, a reasonable exercise of management rights and does not violate the *KVP* standard under the balancing of interests approach. I have additionally concluded that the practice does not, on its face, contravene the *Human Rights Code*. Whether application of the practice constitutes discrimination in a particular case must await an individualized assessment.

The union's grievance was dismissed.

Decisions regarding the reasonableness of drug testing are considered in Chapter 7 of the *Illness and Absenteeism* manual and its supplement.

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2. Whether an employer is justified in requiring a particular employee to submit to a drug or alcohol test will depend on the particular circumstances. Urine testing, as opposed to the administration of a breathalyzer, was held to be overly intrusive where the only observable reason for conducting the test was the smell of alcohol on the employee's breath.

In *Vancouver Drydock Co. Ltd.*, 2018 CanLII 55873 (BC LA) (McPhillips), the employee was requested to attend a meeting with the employer's safety personnel after others had smelled alcohol on his breath. After having confirmed the smell of alcohol, the employee was requested to submit to drug and alcohol testing. He consented to taking a breathalyzer to test for alcohol impairment, but he resisted taking a urine test. He was told that failure to do so would result in his termination pursuant to the employer's Substance Abuse Policy. The employee then agreed to undergo both tests. The resulting breathalyzer test was negative based on the parameters of the employer's policy. The urine test was negative for all substances, with the exception that it was inconclusive for cocaine. The employee was suspended with pay pending further testing of the urine sample by a biomedical laboratory. That further testing showed the employee's urine sample as positive MDMA and cocaine metabolite but negative for all other substances. The employee was terminated for having violated the employer's Substance Abuse Policy.

The issue to be determined was whether the employer was justified in requiring the employee to undergo a urine test for drugs.

In addressing the issue, arbitrator McPhillips made the point that some degree of deference must be afforded to members of management who are making decisions within a very limited time frame and without the training of medical professionals. He referenced the comments of arbitrator Picher in *Canadian National Railway Co.* [2013] C.L.A.D. No. 248, where the arbitrator stated:

> I consider it important to recognize that the determination of whether there is or is not reasonable cause to require an employee to undergo a drug test is one that will inevitably involve a degree of subjectivity and that each case must turn on its own particular facts.. Reasonable persons may or may not agree on what conclusions should or might be drawn from an individual's outward appearance or other surrounding facts. However, in a highly

> safety sensitive workplace, some degree of deference must be given to supervisors who exercise that judgment. It is obviously not necessary that they be proved correct as to their concern. In my view it is sufficient that they or a delegate have sufficiently observed the individual employee, have directed their mind to the person's physical appearance, including such factors as their speech or gait, have weighed any other relevant information at their disposal and ultimately have exercised their judgment in good faith.

Arbitrator McPhillips also referenced the following comments of arbitrator Munroe in *Vancouver Drydock Company Ltd.*, 186 L.A.C. (4th) 405:

> There can be no doubt that employers must be given ample scope to properly address alcohol and drug use by employees who work in safety sensitive positions and industries. Alcohol and drug use by employees in such positions and industries can present very substantial dangers to the employees themselves; to their co-workers; and to legitimate property and liability-related interests of their employers. Arbitrators must be careful not to parse too finely the judgments made by employers in their attempts to address the potential for such dangers, which are a very real and substantial concern.

In commenting on some of the likely triggers for testing as set forth in the employer's policy, as for example slurred speech, smell of alcohol on the employee's breath, or mood swings, arbitrator McPhillips stated:

> With respect to many, if not most of those factors, it may be impossible to know in a particular situation what is the cause, be it drugs or alcohol or even personal circumstances, so a testing for both drugs and alcohol would clearly be appropriate. The arbitral and judicial authorities establish that where, for example, there is clear evidence of impairment and it is unclear whether that may be caused by alcohol or drugs, it would be reasonable to test for both.

Here however the only trigger identified by the employer was the odour of alcohol. The arbitrator commented that given this difference, and the fact that he viewed a urine test as being far more invasive of personal autonomy than a breathalyzer test, there were insufficient grounds to compel the employee to undergo a urine test:

> It is my view that, even assuming there were sufficient grounds for the blood-alcohol test, it has not been established that there were grounds to suspect that the [employee] was or may have been under the influence of drugs which would potentially or reasonably justify the more intrusive urine test. This failure to consider the difference between the appropriateness of a drug and alcohol test indicates the Employer did not properly consider and balance the [employee's] privacy interests …

The arbitrator held that the results of the urine testing were not admissible:

> Although it is clear that arbitration boards have discretion with respect to evidentiary matters, where a breach of privacy has occurred such as in the situation here, it would be unacceptable to tacitly condone unjustified testing by allowing into evidence the results of that testing.

Decisions regarding the reasonableness of drug testing are considered in Chapter 7 of the *Illness and Absenteeism* manual and its supplement.

3. A terminated employee was required to produce her income tax returns to substantiate her alleged loss of $500 per month in gratuities.

In *Swiss Chalet (No. 2)*, 2017 BCHRT 117 (CanLII) (Ohler), the employer sought to have the complainant disclose documents relating to wage loss and mitigation of such loss.

The employee had alleged that she had previously earned $500 per month in tips. The adjudicator considered that the complainant's tax returns were relevant to establish such loss.

The complainant was ordered to disclose, within two weeks from the date of this order:

> a) any documents not previously disclosed relating to the complainant's mitigation efforts including her efforts to find work, including resumes and applications as well as correspondence, emails, texts and phone images, to and from her, related to her efforts to find work from the date of her termination by her former employer to the date on which she commenced her new employment
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> b) her income tax returns for 2013, 2014 and 2017
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> c) any documents not previously disclosed showing any income paid to her from any employers other than her new employer since termination by her former employer
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> d) the T4 statement issued by her current employer for the year 2016.

Cases involving the production of documents are considered in Chapter 10 of the *Illness and Absenteeism* manual and its supplement.

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4. An employee may not be held to the terms of a complaint settlement where the settlement was based on a material misapprehension of the facts.

In School District C (N0. 3), 2017 BCHRT 217 9CanLII) (Juricevic), a child's parents had alleged that their child had been discriminated against with respect to school services based on disability.

Although the parties had earlier negotiated a valid settlement agreement, the adjudicator declined to dismiss the complaint on the basis that the settlement that had been reached prior to the hearing was based on a material misapprehension of the facts, such that it would not "further the purposes of the *Code* to hold the parties to its terms … In my view, the purposes of the *Code* are not served by holding the Complainants to a settlement they did not intend to agree to and which would deprive them of the opportunity to fully pursue the complaint."

The complainants had failed to comply with previous Tribunal orders for document disclosure. The Tribunal commented that the failure to disclose resulted in prejudice to the Respondents, and that, in order to preserve the fairness and integrity of the hearing, the complainants would "not be entitled to tender the outstanding documents into evidence at the hearing, or lead evidence about what the makers or holders of the outstanding documents have told them."

Issues concerning the disclosure of documents are considered in Chapter 10 of the *Illness and Absenteeism* manual and its supplement.

5. The frequent and unpredictable absences of a disabled employee in a small business office was not, without more, sufficient to establish that the employer was able to rely on a defence of undue hardship in defending against the employee's allegation that she should have been accommodated rather than terminated.

In Dr. Daniel Deheshi and others, 2017 BCHRT 240 (CanLII) (Korenkiewicz), the complainant had been employed as a dental receptionist for approximately four months before she was terminated following a meeting convened to deal with her unpredictable attendance. Over the course of approximately eight weeks, the employee had missed 11 full and three partial days of work.

The employee had been scheduled for surgery three weeks after the date of that meeting. The employer's position was that the employee's unpredictable absences were impacting its dental practice. The employer encouraged the employee to take an unpaid leave during the three weeks leading up to the surgery. The employee resisted, saying that she couldn't afford to be without income.

By coincidence, the employer had just received a job application that the employee had submitted in response to a posting on Craigslist by an unnamed dental firm. The employer, who had placed the posting on an unnamed basis, considered that the employee's application made several unfounded claims about her current position. The employer decided to terminate the employee at the meeting because "she admitted she lied" and she had responded aggressively, calling the principals of the practice "dishonest people."

The adjudicator accepted that the 14 days that the employee missed over the eight week period caused some real hardship, in that the employee was the only dental receptionist that was scheduled on some days. Nevertheless, the duty to accommodate requires the employer to prove that it turned its mind to considering how to accommodate the employee's disability. The adjudicator stated:

> In order to establish the defence of undue hardship, the [employer] must show that they considered all reasonable alternatives for accommodation and that there were none. [Other than offering to provide unpaid leave to the date of her surgery, the Employer had] not provided any evidence regarding what steps, if any, they took to try and accommodate [the employee's] disability by providing her with modified duties, modified hours of work or other accommodation that would have permitted her to continue to work, in any capacity. They have not provided any evidence regarding the extent to which they inquired into or understood the extent of [the employee's] physical restrictions or limitations by requesting further information from the employee or her physician, for example.

The adjudicator also stated that

> … the employer[s] are small business owners who work in a small office with a limited number of employees. [They argue that the employee's] constant unpredictable absences put too large of a strain on [the employer] and other staff members who had to do [the employee's] work in addition to their own when she repeatedly missed work. While I appreciate that staffing issues in a small office environment may pose a challenge, I observe that [the employer has] provided little evidence to support their argument on this point. They have not described how the Practice is organized, how many staff are employed or how tasks are divided among them, for example. They have not provided evidence that shows how or why [the employee's] absence from work for fourteen days

during an eight week period excessively hampered proper operation of the Practice such that her employment contract was frustrated.

The adjudicator concluded that she was not satisfied that there was no reasonable prospect that the complaint would succeed. The employer's application to dismiss the complaint pursuant to s. 27(1)(c) was therefore denied.

Decisions addressing the concept of undue hardship are considered in section 14:500 of the *Illness and Absenteeism* manual and its supplement.

C. Subscriber-Only Manual Supplement for March, 2019

The March, 2019 update of the Manual Supplement is being posted on line. The extensive supplement is available only to subscribers of the *Illness and Absenteeism* manual. It can be accessed at IllnessandAbsenteeism.com using the subscriber's email and assigned password

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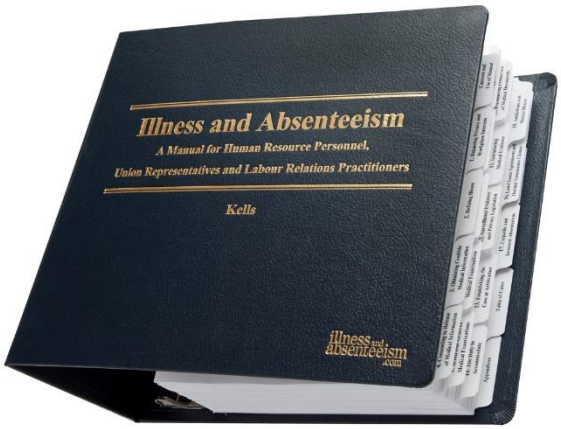
About Illness and Absenteeism



Illness and Absenteeism.com is published monthly. It highlights recent cases addressing matters included in *Illness and Absenteeism: A Manual for Human Resource Personnel, Union Representatives and Labour Relations Practitioners*. Both are published by Dunlop Publishers (Canada) Ltd. and both are authored by Denny Kells.

The manual is available as an annual loose leaf subscription. Its unique format identifies each of the governing principles and then provides the reader with discussion and case excerpts that inform the principles. The manual addresses all aspects of illness and absenteeism. It also includes an extensive chapter focusing on the duty to accommodate employees absent because of illness or injury. Included as well are chapters dealing with pre-hearing production of medical documentation, introducing medical evidence at arbitration, arbitrator-ordered medical examinations, overview of federal and provincial privacy legislation (including the Charter, *PIPEDA* and similar statutory provisions), the admissibility of surveillance evidence, establishing the case at arbitration, assessing credibility and weighing conflicting medical opinions, addictions and mental illness, last-chance agreements and deemed termination provisions, culpable or blameworthy absenteeism and circumstances justifying termination for non-culpable or innocent absenteeism. Some chapters are supported by a checklist designed to assist in assessing the workplace issue in the context of the stated principles.To subscribe to the manual or this newsletter, or to review an in-depth table of contents and a sample chapter, go to www.illnessandabsenteeism.com, or [click here].

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The Illness and Absenteeism manual is now being offered for a 90 day trial period. Orders placed by mail or email will not be invoiced until the expiry of that period.

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