Illness and Absenteeism Newsletter – September 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 emailing denny@illnessandabsenteeism.com.

In this edition you will find:

A. Featured Case: Family leave that is available under or has been taken pursuant to employment legislation cannot be considered when determining an employee's movement through an Attendance Management Program.

B. Recent Decisions of General Interest

1. An employer was justified in having terminated an employee for vaping medical marijuana while driving the employer's vehicle.

2. A post-incident urine test that revealed the presence of a marijuana metabolite was not sufficient to establish that the employee had reported for or actually worked while impaired or "under the influence" of marijuana.

3. An employee who arrived late because of a blizzard was not entitled to be compensated for lost time. The arbitrator reasoned that the employee had "failed to make every reasonable effort" to be on time, despite the fact that the delay was solely attributable to the employee having to wait for her highway to be plowed.

4. An employer was found to have discriminated against an employee when it terminated her employment after it became aware of her cancer diagnosis and upcoming surgery. The employee was awarded $15,000 for injury to her dignity, feelings and self-respect.

5. In exercising a discretion to grant or deny a leave of absence, an employer must act reasonably and consider all of the relevant factors. That is true even where the leave request is attributable to a lengthy incarceration. The employer bears the onus of

establishing that it considered both the employer's interest in having its operation free of disruption and the employee's legitimate interest in maintaining her employment,

C. Subscriber-Only Manual Supplement for September, 2019

D. About Illness and Absenteeism: The *Illness and Absenteeism* manual is now being offered on a 90 day trial basis.

A. Featured Case: Family leave that is available under or has been taken pursuant to employment legislation cannot be considered when determining an employee's movement through an Attendance Management Program.

In *Coca Cola Refreshments Canada Company*, 2018 CanLII 6395 (BC LA) (Fleming), the Union had filed a policy grievance in which it challenged one aspect of the Employer's Attendance Management Program. More specifically, it asserted that "including family responsibility leave for the purpose of determining whether an employee's absenteeism is excessive, so as to warrant inclusion in the AMP, should not be permitted." The arbitrator stated:

> The AMP provides that leaves under the Collective Agreement taken by an employee are not counted as an occurrence for the purposes of the AMP. Article 5 of the Collective Agreement provides a number of leaves which include union leave, leave due to illness or injury, educational leave, bereavement leave, general leave, leave of absence where an employee's driver's license has been revoked, maternity and parental leaves, family leave and jury duty leave,
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> Family leave is the only leave under Article 5 that is considered for the purpose of the AMP. Article 5(k) reads as follows:
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> > 5(k) Employees will be entitled to [the] Provincial Family Care Leave Plan as described in the British Columbia *Employment Standards Act.*
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> That leave is not considered in calculating employee absenteeism for the purposes of the AMP.
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> The union submitted that the employer's policy of including family responsibility leave for the purposes of the AMP means that leave could trigger the employee's involvement in the AMP, which contemplates a decreasing number of acceptable absences through each stage of the process. It argued that the placement of an employee in the AMP as a result of the exercise of their statutory right to family responsibility is a violation of s 54 of the *Employment Standards Act*.

The Union also argued that by including the exercise of an employee's statutory right to family responsibility leave as a trigger to the employee's involvement in the AMP, the employer was essentially limiting the exercise of that statutory right.

The arbitrator began his analysis by stating that

> It is well established … that the Employer has a legitimate interest in managing employee absences, including to monitor them. To that end, the employer has the right to inquire into the reasons for an absence, and to be assured it is for legitimate reasons, and the employee has an obligation to explain or justify the absence.
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> It is also well-established … that the Employer has a right to establish and administer the AMP.
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> There is also no real dispute that the AMP serves a legitimate purpose in monitoring and reducing employee absenteeism.
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> The narrow issue arising is whether family responsibility leave should properly be included in that exercise, particularly in respect to the AMP and the calculation of excessive employee absences.

The arbitrator found that *prima facie,* employees using family responsibility leave are treated differently in respect to the administration of the AMP than employees exercising their right to the other leaves under Article 5 of the Collective Agreement and part 6 of the *Employment Standards Act.* He stated that the issue arising is therefore whether that different treatment is justifiable or reasonable. He stated that the primary explanation advanced for the inclusion of family responsibility leave in the absenteeism calculations when the other Collective Agreement leaves are not, is that it is legitimate for the employer to monitor and reduce the family responsibility leave absences and that there is some benefit to an employee in attempting to find ways of reducing the need for such absences because they are unpaid. He then noted that other Article 5 leaves, including family compassionate leave, are also unpaid but they are not relied upon for the purpose of the AMP absenteeism calculations. The arbitrator further stated:

> I accept that some different treatment in terms of the operation of the AMP in respect to employees who take family responsibility leave could be permissible if a persuasive justification for the different treatment were to be established. However, in my view, if the inclusion of family responsibility leave in the AMP absenteeism calculations results in an adverse impact to those employees who exercise that right, that would be inherently problematic.

The arbitrator found that it did not constitute an adverse impact for family responsibility leave to be included for the purpose of monitoring and identifying potential excessive employee absenteeism. He also found that it did not constitute an adverse impact for the Employer to then have informal discussions with an employee based on that calculation, as contemplated in the initial informal counselling meeting of the AMP.

However, he found that a concern regarding adverse impact arises in respect of Stage 2 of the AMP because that stage contemplates the employee being advised of the possible consequences if attendance is not improved, which presumably would include the potential of termination later on in the process.

> The employee's use of their right to family responsibility leave is a factor in the inclusion of the employee at that stage and in any subsequent progression through the AMP process. The Employer's practice imposes a burden or disadvantage on employees who

> exercise their right to family responsibility leave, which does not arise for employees using the other leaves under Article 5 of the Collective Agreement.

The arbitrator concluded that the inclusion of family responsibility leaves for the purposes of absenteeism calculations, with the resulting impact at those stages of the process, is unreasonable and therefore not consistent with the KVP principles. He further stated:

> In the context of the corrective or coercive nature of the AMP and in the absence of any persuasive justification regarding why family responsibility leave is distinguished from and treated differently than other Article 5 leaves, I find that the Employer's practice or policy of including family responsibility leave, which may result in an employee being pushed over the acceptable absenteeism threshold into stage 1 of the formal process, to be arbitrary and unreasonable and therefore not consistent with the KVP test.

In terms of remedy, any employee who had been placed into the formal stages of the AMP due solely to their having taken family responsibility leave was to be removed from the formal stages of the AMP. Further, family responsibility leave was not to be included in the absenteeism calculations for the purposes of an employee's inclusion in the formal stages of the AMP.

Matters involving the establishment and operation of an Attendance Management Program are considered in section 17:300 of the *Illness and Absenteeism* manual and its supplement.

B. Recent Decisions of General Interest

1. An employer was justified in having terminated an employee for vaping medical marijuana while driving the employer's vehicle.

In *Kindersley (Town)*, 2018 CanLII 35597 (SK LA) (Hood), the employee had been prescribed medical marijuana for vaping. His physician advised that he was not to operate the employer's Zamboni, forklift or lawnmower for 20 to 30 minutes after having vaped. The employer accommodated him by transferring him from a position in its Arena to one in its Parks department.

His medical marijuana prescription was for 10 grams per day.

The employee and two of his co-workers drove to Humboldt to take courses related to their employment. All three travelled in a vehicle that had been signed out from the employer. The employee was terminated for having vaped marijuana while driving the employer's vehicle to Humboldt.

The arbitrator concluded that on the basis of a preponderance of probabilities, the employee was "more likely than not vaping while driving and vaped marijuana in Humboldt before he operated the Town vehicle without waiting the required 20 to 30 minutes."

The arbitrator stated that the employer had an obligation to reasonably accommodate the employee's disability. It had done so by accommodating the employee with continued employment in its Parks department. He stated that:

> The accommodation required the [employee] not to mix marijuana with operating motorized equipment. It is the mixing of the use of marijuana with the operation of the Town vehicle that is the misconduct leading to termination.

The employee's termination was upheld.

Decisions regarding the use of both medical and recreational marijuana are considered in section 15:202 of the *Illness and Absenteeism* manual and its supplement.

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2. A post-incident urine test that revealed the presence of a marijuana metabolite was not sufficient to establish that the employee had reported for or actually worked while impaired or "under the influence" of marijuana.

In *Airport Terminal Services Canadian Company*, 2018 CanLII 34078 (CA LA) (Randazzo), the employee was terminated after having tested positive for marijuana. The arbitrator framed the issues as follows:

> 1. Was the employee employed in a safety sensitive position?
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> 2. Did the mandatory drug and alcohol testing imposed after a post-incident occurrence comply with the collective agreement and applicable legislation?
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> 3. Did the employer properly apply the drug and alcohol policy to the employee?
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> 4. Does an immediate or automatic discharge (subject to mitigating circumstances) following a positive test violate the collective agreement and applicable legislation?
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> 5. Did the employee's use of medically authorized marijuana violate the drug and alcohol policy?
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> 6. Did the termination violate the employee's rights under the *Canadian Human Rights Act*?
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> 7. If the termination was a violation of the collective agreement and/or the *Canadian Human Rights Act*, should the employee be reinstated and compensated for his losses?

The employee was one of a three person "ramp crew." After the flight had been marshalled, the employee rolled the "tow bar" towards one of the other crew. The tow bar struck the parked plane and damaged one of its lights.

The two employees were advised to file a written statement of the events leading to the aircraft damage. They were also advised that they were required to undergo a drug and alcohol test.

At the testing facility, the grieving employee took and passed a breathalyzer test and provided a urine sample. Six days later, the employee was advised that the urine test indicated small traces of a marijuana metabolite (THHC-COOC). The employee's use of marijuana had been prescribed by his medical doctor. The arbitrator accepted that the metabolite could remain present for upward of 60 days.

The employee was asked if he would explore alternatives to using medical marijuana. He was presented with a "Final Warning-Mandatory Referral to EAP" letter and agreement. In order to avoid termination, the employee was required to agree that he had a substance abuse problem, agree to enter the Employee Assistance Program, meet with a counsellor, agree to remain drug and alcohol free and agree to random drug testing. A refusal to agree to these terms would result in termination. The employee was given five days to explore alternatives to medical marijuana and to sign the Final Warning-Mandatory Referral to EAP, thereby agreeing to its terms, or be terminated. The employee refused to do so and was terminated.

The arbitrator found that the employee was not impaired at the time of the accident. He stated that he was however troubled by certain aspects of the evidence. In the three years where the employee had been authorized to use medical marijuana, there was no evidence presented that the employee had undergone a medical examination of the type recommended by the employer's expert. There was no evidence of follow-up visits with his treating physician; there was no evidence that he had entered into a medical marijuana use agreement; his dosage, which was 5 mg a day, was the highest daily dose and there was no evidence that his physician, during the three year period of consumption, had ever attempted to titrate the dose or strain. Moreover, the employee had no idea of the strength or strain of the medical marijuana that he was taking.

The arbitrator also commented that the employee was working in a safety-sensitive position and that the expert evidence and related literature were inconclusive when it came to determining the window of impairment which varies depending on the strain, dosage and the user, and as such, extreme caution should be taken when an employee is taking medical marijuana in a safety-sensitive workplace.

The Union had argued that the policy, which required drug and alcohol tests after any accident, was overly broad, and that it did not balance the privacy rights of the employees with the interests of the employer. The policy provided that:

> Employees will be subject to testing if there is reasonable cause to believe probable drug and/or alcohol use. Reasonable cause will be based on a specific event (physical, behavioural or performance) indicative of probable drug and/or alcohol use.

The policy defined a post-incident drug and alcohol test as follows:

> Employees will be subject to testing if they are responsible for a work-related injury requiring medical treatment from a medical professional, work-related accident, including but not limited to, accidents associated with the operation, repair or movement of an aircraft; motor vehicle accidents involving [an employer] or customer vehicle; accidents resulting in injury to a person, property damage to or with an aircraft; and accidents while conducting [the employer's] business.

The arbitrator commented that the Supreme Court of Canada, in *Irving Pulp & Paper Ltd.*, 2013 SCC 34 9 CanLII, had stated that the dangerousness of the workplace is a relevant consideration in determining whether an employer's rule or policy is reasonable. He stated that although relevant, "it is not the end of the examination but the beginning of a proportionality exercise." The Court had stated:

> A substantial body of arbitral jurisprudence has developed around the unilateral exercise of managements rights in a safety context, resulting in a carefully calibrated "balancing of interests" proportionality approach. Under it, and built around the hallmark collective bargaining tenet that an employee can only be disciplined for reasonable cause, an employer can impose a rule with disciplinary consequences only if the need for the rule outweighs the harmful impact on employees' privacy rights. The dangerousness of a workplace is clearly relevant, but this does not shut down the inquiry, it begins the proportionality exercise.
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> This approach has resulted in a consistent arbitral jurisprudence whereby arbitrators have found that when a workplace is dangerous, an employer can test an individual employee if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse. In the latter circumstances, the employee may be subject to a random drug or alcohol testing regime on terms negotiated with the union.

The arbitrator stated that

> a proportionality approach attempts to balance the employer's right to impose and apply reasonable rules designed to ensure or protect the safety of its workforce against the privacy rights of its employees. Such approach would suggest that an inflexible rule mandating drug and alcohol tests after all accidents or incidents would fail as overly broad.

The arbitrator then referenced *Bombardier*, 2014 CarswellNat 240 (Schmidt), where arbitrator Schmidt found that a policy that required testing after any incident, which included "near misses" and those accidents which did not result in injury or damage, was unreasonable. Arbitrator Randazzo then commented that "a drug and alcohol policy, in a safety sensitive workplace, which provides for post-incident testing should be limited to "serious" or "significant" accidents or incidents and tests should only be conducted where there are reasonable grounds to do so. The seriousness of the incident will be a factor in determining "reasonable grounds" in the circumstances."

Arbitrator Randazzo stated that other factors can contribute to the employer's decision to require a post-incident drug and alcohol test. "For example, if the employee had, on a previous occasion, been found to have violated the drug and alcohol policy by arriving at work impaired or by being in possession of a controlled substance while in the workplace, these factors would contribute to the reasonableness of an employer's decision to require an employee to undergo a post-incident drug and alcohol test."

The arbitrator noted that the employer's Drug and Alcohol Policy, "to the extent that it mandates drug and alcohol testing after any accident or incident, regardless of its significance, is overly broad and unreasonable." However, that conclusion "does not automatically result in a finding that the policy was improperly applied to the employee. To answer this question, it is necessary to review the seriousness or significance of the accident and any other related circumstances to determine if a drug and alcohol test was warranted."

Although the arbitrator considered that the process followed by the employer was flawed, "the result, the ordering of the drug and alcohol test, was ultimately correct." He stated that "in these circumstances, it would not be appropriate to void or invalidate the results of the drug and alcohol policy."

The employer's Drug and Alcohol policy mandated automatic discharge "subject to mitigating circumstances. Those mitigating circumstances were specifically limited to circumstances where the employee suffer[ed] from an addiction and did not include situations where the employee required a medical accommodation." The arbitrator commented that the policy did not provide "for a meaningful process or accommodation for those who are prescribed or authorized to use narcotics or other controlled substances, such as marijuana, to treat physical or mental health issues." He stated that the policy therefore did not comply with an employer's statutory obligation to accommodate an employee's disability to the point of undue hardship.

The arbitrator noted that the fact that the drug test indicated that there were THC antibodies in the employee's urine did not support a finding that the employee was impaired, and as such, the employee had not reported for work or worked while impaired. He also stated that the employer's concern of avoiding or eliminating the potentially impairing effects of medical marijuana was a legitimate and paramount concern. He stated that what should have occurred is that once informed that the positive test was attributable to the use of medical marijuana, it was incumbent on the employer to attempt to accommodate the employee. It did not do so.

The employee was reinstated, with the arbitrator reserving jurisdiction to address issues related to the employee's reinstatement.

Decisions regarding drug and alcohol testing are considered in sections 14:330 and 14:410 of the *Illness and Absenteeism* manual and its supplement.

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3. An employee who arrived late because of a blizzard was not entitled to be compensated for lost time. The arbitrator reasoned that the employee had "failed to make every reasonable effort" to be on time, despite the fact that the delay was solely attributable to the employee having to wait for her highway to be plowed.

In *Health PEI*, 2018 CanLII 13793 (NS LA) (Pickard), the collective agreement provided that employees were expected to report for duty and remain at their work station without exception because the hospital would not be closed due to storm conditions. Employees who were absent or late due to storm conditions had to make up the time, or use entitlement time, or lose pay. A separate provision provided for relief if the employer was satisfied that the employee had made every reasonable effort to be at work at the scheduled time. The specific collective agreement language is reproduced in the case decision. In particular, the collective agreement stipulated that

> reasonable lateness beyond the beginning of the employee's starting time shall not [result in a loss of pay where the] lateness is justified by the employee being able to establish, to the satisfaction of the Employer, that every reasonable effort has been made by the employee to arrive at her workstation at the scheduled time.

On the day in question, the employee awoke to a raging blizzard. Her drive to work would normally have taken five to six minutes. However, the snow was up to the bumper of her husband's four wheel drive truck. The highway had not been plowed. Approximately 90 minutes after the start of her shift, a plow cleared one lane on the opposite of the side that she needed to travel. When the plow didn't return in 10 minutes, she and her husband set out. They drove the entire distance on the wrong side of the highway and arrived at the hospital approximately one hour and 50 minutes after her normal start time.

Her claim for the lost time was denied. The arbitrator stated that "the proximate cause for [her] inability to arrive on time for work … was storm conditions" within the meaning of the clause. Nevertheless, the employee's actions still have to pass the test of showing that every reasonable effort has been made to enable the employee to attend at work is spite of the usual adverse weather conditions experienced in our climate … Hospitals cannot close [and so] depend on their employees to get to work on time in spite of adverse weather. Roads take time to be plowed depending on the amount of snowfall and other weather conditions and cannot be relied upon to always be plowed in time to enable employees to arrive at work at their scheduled time."

The arbitrator stated that in his opinion, the relevant article "requires an employee, if he or she wishes to avoid [lost pay], to take steps to cope with unplowed roads, such as being able to walk or snowshoe or snowmobile to work, or have a vehicle available that is able to cope with the unplowed roads … If after taking such reasonable measures to cope with anticipated adverse weather the employee is still delayed or prevented from arriving at work, then [the article] is available to provide relief.

> In the present case I find that the employer appropriately considered the circumstances of [the employee's] reasonable lateness claim and reasonably decided that waiting for the plow to clear the highway did not meet the test of showing that every reasonable effort had been made to arrive at her workstation at the scheduled time.

The employee was however compensated for the additional 30 minutes that it took her to drive to the hospital.

Lateness related issues are explored in section 17:201 of the *Illness and Absenteeism* manual and its supplement.

4. An employer was found to have discriminated against an employee when it terminated her employment after it became aware of her cancer diagnosis and upcoming surgery. The employee was awarded $15,000 for injury to her dignity, feelings and self-respect.

In *Vistakrupa Corporation*, 2018 HRTO 207 (CanLII) (Martel), the employee alleged that her employment was terminated after her employer became aware of her cancer diagnosis and upcoming surgery.

The adjudicator found in favour of the employee, and concluded that "the [employer's] decision to terminate her employment was more than likely due to her cancer diagnosis and what that would or would likely imply in terms of future time off, scheduling and accommodation requests."

In concluding that the employee suffered from a disability, the adjudicator stated:

> I am satisfied that a medical condition requiring surgery and an extended recovery time constitutes a disability within the meaning of the *Code* … In the alternative, I am satisfied that the [employee's] need to be absent for a period of time and her possible need for modified work duties or a modified work schedule upon returning to work would be a perceived disability.

The adjudicator concluded that the employee had made out a *prima facie* case of discrimination. In that regard, he stated:

> The [employee] bears the onus of establishing discrimination on a balance of probabilities. The [employee] must prove it is more probable than not that one or more *Code* grounds was a factor in the decision to terminate [her] employment.

The onus then shifted to the employer to rebut that finding:

> If the [employee] makes out a *prima facie* case of discrimination, the evidentiary burden shifts to the [employer] to provide a rational explanation which is not discriminatory. The [employer] must offer an explanation which is credible on all the evidence. The ultimate issue is whether an inference of discrimination is more probable from the evidence …

The employer's explanation of unsatisfactory performance was not credible. The employer did not present any documentary evidence to support its allegations of customer complaints. Moreover, the employer's explanation that the employee's performance was not adequate lacked credibility. The fact that the employee was left on one occasion to manage customers on her own displayed a degree of trust in the employee that was not indicative of poor performance.

In considering the issue of damages, the adjudicator stated that she was satisfied that the termination caused injury to the employee's dignity and feelings. She accepted the employee's unsupported testimony that the employer's actions adversely affected her self-confidence and led to "mental disability" for which she now takes antidepressants:

> The [employee] did not provide medical evidence concerning the impact of the [employer's] actions. I accept nevertheless that being terminated while awaiting cancer surgery would have resulted in significant distress during what was likely already a very stressful time.

The adjudicator awarded $15,000 for injury to the employee's dignity, feelings and self-respect. The employer was also ordered to pay 27 days of lost wages. A failure to mitigate was not a factor, for the employee was not required in the circumstances to work for the employer to the end of her notice period. Further, the employee could not be expected to obtain work with another employer during the period following her termination but prior to her surgery. Lost wages were not awarded for the period following surgery, for the employee's period of recovery made it unlikely that the employee could have worked for any other employer during such period.

Pre-judgment interest was awarded pursuant to the Courts of Justice Act (Ontario).

The requirement for an employee to establish a *prima facie* case of discrimination is considered in section 14:410 of the *Illness and Absenteeism* manual and its supplement.

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5. In exercising a discretion to grant or deny a leave of absence, an employer must act reasonably and consider all of the relevant factors. That is true even where the leave request is attributable to a lengthy incarceration. The employer bears the onus of establishing that it considered both the employer's interest in having its operation free of disruption and the employee's legitimate interest in maintaining her employment.

In *Winnipeg (City)*, 2018 CanLII 58462 (MB LA) (Robinson), the employee had been employed as a firefighter and paramedic. After he and his wife separated, his wife obtained a "no-contact" order from the Court. The employee was subsequently arrested for having disobeyed that order. Those and other charges led to his ongoing incarceration.

The employee remained in custody for a number of weeks following his arrest. He subsequently returned to work but was arrested and incarcerated for related offences some seven weeks later. The employer then placed the employee on a leave of absence "due to the exhaustion of his annual leave credits and the inability to use sick leave for his absence due to incarceration."

Several months later, the employer requested that the employee provide written verification of the status of the ongoing court proceedings and his expected date of return to work. He was advised that the Department was not prepared to grant an indefinite leave and that it required the additional information that it had requested by a specified date.

The employer was advised that it was impossible to know when the employee could return to work, for he would not be released from jail until after the verdicts had been handed down on the pending charges. The employer was not satisfied, and it scheduled a disciplinary hearing to deal with the issue. Management recommended that the employee's employment be terminated. At that time, management opined that the matter would not likely be resolved for a further 10 months.

The Deputy Chief upheld the recommendation to terminate on the basis that the employee had now been absent for one year with no anticipated date of return.

The collective agreement did not contain a general leave of absence provision. It did however make reference to other leaves, and the employer acknowledged that it had the power to, and had in fact granted administrative leaves for fairly lengthy periods of time. The employer also

acknowledged that in considering such leaves, the employer would be required to act fairly, reasonably and in good faith.

Arbitrator Robinson stated:

> The weight of arbitral authority supports the position that in exercising the discretion to grant or deny an employee's request for a leave of absence, an employer must act reasonably and consider all of the relevant factors and circumstances. This requirement is also applicable to an employee who requests a leave of absence to cover a period of incarceration.

The arbitrator further stated that a comprehensive summary of the state of the reasonableness standard in that context can be found in *Brown & Beatty* at paragraph 7:3120.

Arbitrator Robinson referenced the decision of arbitrator Shime in *Alcan Canada Products*, [1974] O.L.L.A. No. 18 as being the seminal case on the issue. There, arbitrator Shime commented on the necessity of balancing the interests of the employer and the employee:

> It is clear that the employer has an interest in not having production disrupted and in not being unduly inconvenienced due to absenteeism for a jail sentence. While it is understandable that an employee may be excused for absenteeism resulting from illness, the same tolerance may not be forthcoming when an employee is absent because he is serving a jail term. However, the employee has also an interest that is deserving of protection. An employee's service with the Company and a good work record should be entitled to some protection with the result that in each case there must be a balancing of interests in order to determine whether the discharge is for just cause. There is no reason for a Board of Arbitration to consider absence *per se* as a basis for discharge. In this type of situation, the employer's interest in having production free from disruption must be balanced against the employee's work record, the nature of the offence and the duration of the jail sentence.

Arbitrator Shime concluded that there was no basis for the termination, for there was:

> No evidence whatsoever before the Board by the Company official who decided to terminate [the employee] that the production needs of the Company were considered and that the [employee's] absence caused a disruption in production.

Arbitrator Robinson also considered the following decisions:

> (i) *Canada Post Corporation*, [2013] C.L.A.D. No. 2, where arbitrator Shime concluded that an employer improperly refused to extend a leave of absence when it failed to "consider that there was no disruption to the Corporation's operations as a result of the grievor's incarceration nor was there any harm to its public reputation." Failure to consider all of the relevant factors rendered the employer's actions arbitrary.
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> (ii) *Mark Canada Inc.*, [1990] O.L.L.A. No. 72, where the employee was terminated after he was unsuccessful in attempting to arrange leave pursuant to a Temporary Absence Program. "The employer presented evidence that granting the employee the leave that he sought raised a number of operational concerns, including establishing a precedent, the potential cost of benefits, and the fact that the employee's return following his incarceration

would require the dismissal of the most recently hired employee. The arbitrator concluded that the employer met the required standard of reasonableness and upheld the termination."

(iii) *Alcan Canada Products*, [1974] O.L.A.A. No. 2, where the arbitrator upheld the denial of a leave. Arbitrator Ponak "accepted that the employer did not act in bad faith or in an unreasonable manner in rejecting the employee's request for a leave of absence. While the evidence did not indicate that there would have been substantial disruption in the workplace had the leave been granted … the arbitrator accepted that holding a position for an employee who is away for a long period of time, especially if they occupy a higher position, is "inherently disruptive to some extent." … In addition … the employer adduced evidence regarding specific operational concerns that it considered when denying the leave." The decision observed that the "main basis for the denial of the leave was the employer's conclusion that the grievor was not the kind of employee to which they wished to grant an extended leave of absence." The employee's overall performance was lacking, he had recently been disciplined, and his past behaviour was habitually problematic. Given those factors, the employer's decision to deny the leave was not unreasonable.

(iv) *GSW Water Products Inc.*, [2008] O.L.A.A. No. 420, where the employee had been incarcerated for nine months. The request for a leave was denied, with the arbitrator concluding that the employer fairly and reasonably balanced its interests against those of the employee. The termination was upheld.

(v) *City of Welland*, [1981]).L.A.A. No. 83, where the arbitrator upheld the denial of a leave of absence to an employee who was incarcerated for seven months. The employee was described as "less than average". He had received several reprimands during his employment and rebelled against management and supervision.

In upholding the employee's grievance, arbitrator Robinson stated:

> … The evidence did not establish that the Employer, in exercising the discretion to deny the requested leave and terminating the [employee's] employment, considered whether the employee's absence would cause a disruption in operations or if it would otherwise affect the Employer's capacity to provide fire protection to the public. The decision-makers for the Employer did not testify at the hearing and their written decisions do not indicate that they considered the appropriate factors or that they balanced the Employer's interest in having its operations free from disruption against the [employee's] legitimate interest in maintaining employment."

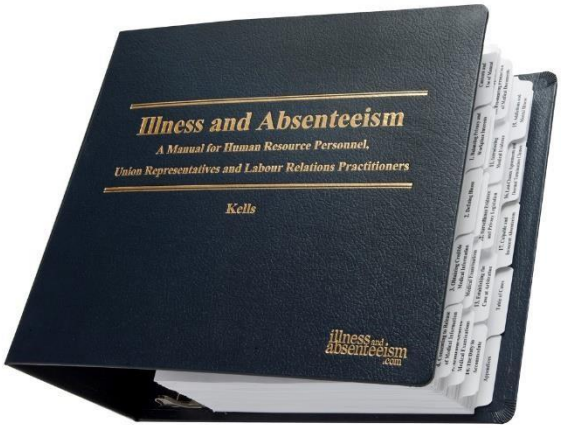
The arbitrator also noted that the employer had testified that overtime had been used approximately 150 times during the employee's authorized absence from work. He rejected overtime as a consideration, for as the employer acknowledged, overtime usage may result from any number of factors. Moreover, there was no evidence that overtime costs or any other financial implications were considered in denying the leave.

Principles regarding leaves of absence are considered in Chapter 7 C of the *Illness and Absenteeism* manual and its supplement.

C. Subscriber-Only Manual Supplement for September, 2019

The September, 2019 update of the Manual Supplement is now 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.

About Illness and Absenteeism



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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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