Illness and Absenteeism Newsletter – May, 2014 Edition

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.

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

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disability. No medical evidence had been adduced and the union’s argument had been directed to mitigation rather than accommodation. [Click here]

4. A connection between a prohibited ground of discrimination and discipline is often established from reasonable inferences drawn from surrounding circumstances. In that regard, an adjudicator may consider the temporal relationship between an employee’s actions and the employer’s decision to discipline the employee. Documents, such as emails created at the time of the events (other than those involving external communications to clients), may be the most accurate reflection of what transpired in the workplace. This case also considered the approach to be taken in assessing conflicting evidence. [Click here]

C. Subscriber-Only Manual Supplement for May: General Preview Now Available until June 15, 2014 [Click here]

D. About Illness and Absenteeism

Offer to Preview Manual and Manual Supplement: The Illness and Absenteeism manual is now being offered for a 45 day trial period. Orders placed by mail or email will not be invoiced until the expiry of that period. In addition, the extensive cumulative manual supplement can be previewed until June 15, 2014. [Click here]
A. Feature Case: An employee’s complaint of discrimination can be established through circumstantial evidence and, by reason of the procedural duty to accommodate, the employer had a duty to inquire into whether the employee required accommodation. In this case, the employer had failed in its procedural duty to adequately investigate the employee’s complaint.

In Honda of Canada Mfg., 2014 HRTO 45 (CanLII) (Keene), the employee suffered several vision related issues, one of which was that he was colour blind. His position involved inspection and terminal data entry as vehicles moved down a production line. The complaint arose after the employer changed the colours used on the software, including a switch from black lettering on a yellow background to black lettering on a red background. The employee left work due to stress, and when he returned six months later, he did so on the basis that the employer would be implementing various accommodation measures that would enable the employee to meet the job requirements. The employee was terminated eight months after his return.

In upholding the employee’s complaint, the adjudicator affirmed that a complaint can be established, at least in part, through circumstantial evidence.

Direct evidence of discrimination, such as testimony from a witness to discriminatory conduct, is not necessary to establish a breach of the Code. The applicant may rely on circumstantial evidence, which may include evidence of actions or omissions on the part of the respondent that raise inferences that a Code provision has been breached. The inference drawn need not be inconsistent with any other rational explanation to provide evidence of discrimination. Rather, it must be reasonable and more probable than not, based on all the evidence, and more probable than the explanation offered by the respondent …

The adjudicator found that the employee’s colour blindness, nearsightedness, myopic degeneration and loss of high frequency hearing in one ear constituted disabilities for the purpose of the Code. She found that the employer had notice of these disabilities as early as nine years prior to the matters at issue. While the employee had not made any formal request for accommodation during that period,

… the procedural duty to accommodate indicates that an employer cannot passively wait for an employee to request accommodation where it is aware of facts that indicate that the employee may be having difficulties because of disability; there is a duty to take the initiative to inquire in these circumstances.

After having reviewed several decisions on point, the adjudicator concluded that the procedural duty to accommodate arose when the employer had reason to
believe that the employee was having difficulty reading the print on his computer. At that point, the employer had a duty to inquire into the possibility that the employee might require accommodation. She found that the employee initially left work as “a direct result of the [employer's] failure to meet its procedural duty.”

The adjudicator also commented that the Code imposes a duty on employers to investigate a complaint of discrimination, and in that regard she adopted the criteria set forth in Laskowska v. Marineland of Canada Inc., 2005 HRTO 2111 (CanLII) (Kershaw). Applying those criteria, she concluded that the employer did not have an adequate anti-discrimination/harassment policy and a proper complaint mechanism; that is, one that adequately addressed common circumstances that might arise in cases of discrimination. [While the employer adduced its policies in evidence, there was] no evidence that adequate training was given to management and employees.”

Shortly before his termination, the employee contacted the Ontario Provincial Police (the “OPP”) with regard to a fellow employee who had poked him with a jig. He was advised to contact witnesses and have them contact the OPP. The employer considered that the issue was not a work place matter, and it refused to help the employee in his efforts to contact employees who might possibly provide evidence. The employer advised him that he was not to contact employees at work regarding the matter, and it requested that the employee meet with its doctor later that day regarding his fitness to work. He did so, with the doctor then advising the employer that there were no concerns regarding the employee’s fitness to work. The day after that examination, the employee advised the employer that he would be prepared to resign and to discontinue the complaints that he had filed in return for an acceptable monetary package. The employer then informed the employee that he was being terminated and would be receiving the compensation package set forth in the letter of termination. The employee considered the package to be inadequate, and he immediately advised the employer that he wanted to withdraw his request for a package and that he would return to work. The employer refused that request.

The adjudicator concluded that “part of the reason for the abrupt decision to terminate the [employee’s] employment was dissatisfaction with the way the [employee] had pursued his rights under the Code, and the perception, which was not confirmed by any further discussion with the [employee], that he was not satisfied with the accommodation that had been arranged some two and a half months earlier. That constituted a breach of s. 8 of the Ontario Human Rights Code.

By way of remedy, the adjudicator ordered that the employee receive 50% of his lost wages and benefits to the date of termination, with the reduced percentage being attributable to the employee's refusal to permit the employer's insurer to speak to his doctor regarding the circumstances underlying his six month absence. The employee had not made any effort to mitigate his losses following
termination. Nevertheless, the adjudicator awarded wage loss for the first month following termination on the basis that it was reasonable to conclude that the employee “might have needed as much as a month to compose himself sufficiently to effect a search for employment.” In terms of compensation to address the effect of the employer’s breach of the Code for injury to dignity, feelings and self-respect, the adjudicator ordered that the employer pay the employee $35,000. in respect of these matters. Pre-judgment and post-judgment interest was also awarded.

The adjudicator also ordered a remedy under section 45.2(1)(3) of the Code to “promote compliance” with the Code. That order directed the employer “to hire a trained human rights professional to draft a policy or policies to address and reflect the [employer’s] procedural and substantive duty to accommodate employment difficulties related to personal characteristics listed in the Code, with the roles of all management employees clearly delineated.”

The issues of circumstantial evidence and the procedural duty to accommodate are considered in sections 13:500 and 14:601 of the Illness and Absenteeism manual, commencing at pages 507 and 627 respectively.

Recent Decisions of General Interest

1. A last chance agreement prohibiting leaving work early could not be interpreted to incorporate chronic lateness.

In Toronto (City of), 2014 CanLII 3489 (ON LA) (Randall), the employee had been terminated for having been late on several occasions, with the reason that he gave for his lateness being traffic related, and for having left early on other occasions. At the time of his termination, the employee had been employed for less than seven months, and was subject to a last chance agreement that obligated him to work his full shift as a member of the employer’s cleaning crew. It specifically provided that he was not to leave work early without his employer’s approval.

The arbitrator found that the Last Chance Agreement did not contemplate lateness:

… The law is clear that Last Chance Agreements, as the quid pro quo for ousting arbitral discretion on remedy, are to be read strictly. In my view, this one addresses specific misconduct: leaving work early. It is not, and I so find, a distinction without a difference to conclude that it was not intended to address lateness …
In addition, I am unwilling to conclude that the [employee’s] chronic lateness, standing on its own, can be grounds for termination. The case law ... supports the notion that chronic lateness is grounds for dismissal, but that same case law makes very clear that for the Employer to rely on same, it needs to have clearly put the employee on notice, through progressive discipline or, at a minimum, a modicum of fair warning, that such persistent lateness was detrimental to the employer’s operation and would not be tolerated. I am unable to find, on the facts of this case, that the Employer met that standard.

However, the termination was upheld on the basis that the employee had left work early on three occasions contrary to the specific prohibitions set forth in the Last Chance Agreement.

The issue of Last Chance agreements is considered in section 16:200 of the Illness and Absenteeism manual, commencing at page 756 of the manual.

2. The duty to accommodate was held to require the employer to consider “bundling duties” to create a sufficiently productive accommodated position.

In Canadian Pacific Railway Company, 2013 CanLII 88339 (CA LA) (Picher), a pregnant employee had been accommodated in a temporary vacancy that had arisen in a management position while the incumbent was on a leave of absence. When the incumbent returned, the employer advised the employee that it could not find other suitable employment for her. She was then placed on a leave of absence until her maternity leave commenced. While on that eight-week leave of absence, she received weekly indemnity benefits equivalent to 60% of her earnings.

The arbitrator found that the employer failed to accommodate the employee’s pregnancy during this eight week period. In doing so, he stated

It was not sufficient for the Company to determine whether there were vacant positions into which the [employee] could be placed. The duty of accommodation goes further, requiring the employer to consider whether various job functions can be bundled together to create a sufficiently productive accommodated position. Additionally, the obligation of scrutiny on the part of the employer, and for that matter on the part of the union, extends beyond the bargaining unit and can encompass managerial responsibilities or work in relation to another bargaining unit, subject only to the limitation of undue hardship.
The arbitrator concluded that in all likelihood, there were “several possibilities which could have led to the creation of an accommodated position” for the employee. The employee was awarded lost wages for the period up to one week prior to her delivery. The union’s request for an order of general damages for pain and suffering was denied.

The issue of bundling job duties is considered in section 14:613 of the *Illness and Absenteeism* manual, commencing at page 663 of the manual.

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3. An arbitrator upheld discipline despite the fact that the employee’s misconduct had arguably been attributable to a disability. No medical evidence had been adduced and the union’s argument had been directed to mitigation rather than accommodation.

In *Canadian Pacific Railway Company*, 2013 CanLII 88339 (CA LA) (Picher), arbitrator Picher upheld the demerit points that had been assessed against an employee who had made threatening comments to a member of the employer’s human resources staff.

The union had argued in mitigation that the employee had been under psychiatric treatment for mood impairment, panic attacks, paranoia, and anxiety attributable to a condition it characterized as Anxiety Spectrum Disorder. No medical evidence was tendered in support of that position. Without engaging in a human rights analysis involving causation, the arbitrator simply commented that

> As unfortunate as any condition which the [employee] has may be, no physical or mental condition gives any employee a license to make abusive or threatening comments in an unacceptable tone of voice within the work place. In the instant case the Arbitrator is particularly impressed with the efforts … the Company has made to accommodate the [employee’s] condition. That accommodation, however, does not extend to tolerating violent speech or threats of physical violence.

Matters related to the conduct of a proper human rights analysis, particularly in cases involving addiction and mental illness, are considered in Chapter 15 of the *Illness and Absenteeism* manual, commencing at page 697 of the manual.
4. A connection between a prohibited ground of discrimination and discipline is often established from reasonable inferences drawn from surrounding circumstances. In that regard, an adjudicator may consider the temporal relationship between an employee’s actions and the employer’s decision to discipline the employee. Documents, such as emails created at the time of events, (other than those involving external communications to clients), may be the most accurate reflection of what transpired in the workplace. This case also considered the approach to be taken in assessing conflicting evidence.

In Inspired Retreats, 2014 BCHRT 6 (CanLII) (Juricevic), the employee complained that the employer had discriminated against her when it terminated her three weeks after she advised that she was pregnant and one day after returning from a leave of absence that she claimed was related to her pregnancy.

The employer denied that the employee's pregnancy played any role in its decision to terminate. Rather, it led evidence that it had made the decision to terminate the employee some months before learning of her pregnancy, but it delayed implementing that decision until it could find a suitable employee to fill the employee’s position. The employer admitted that its advice to the employee that she was being terminated due to a restructuring had simply been used as an excuse to terminate the employee without alleging cause.

In assessing the evidence given on behalf of the parties, the adjudicator stated:

Where there are disputed facts, and in determining whether to accept the evidence of any witness, in whole or part, I have applied the factors set out by the British Columbia Supreme Court in Van Hartevelt v. Grewal [2012] BCSC 658 … and Bradshaw v. Stenner [2010] BCSC 1398 … The Court reviewed a number of authorities. Taken together, the following factors may be considered in assessing credibility:

- Ability and opportunity to observe events;
- Power of recollection;
- Appearance and manner while testifying;
- Whether testimony seems unreasonable, impossible, or unlikely;
- Any inconsistencies in testimony during direct and cross-examination;
- Whether testimony harmonizes with independent evidence;
- Whether a witness has a motive to lie;
- Ability to “resist the influence of interest” to modify recollection;
- Any bias or prejudice the witness may have;
- How the evidence fits into the general picture revealed on a consideration of the whole of the case; and
- Whether evidence was in “harmony with the preponderance of the probabilities which a practical and informed person would readily recognize
as reasonable in that place and in those conditions”: Faryna v. Chorny [1952] 2 D.L.R. 353 (BCCA) …

In assessing the credibility of witnesses, the adjudicator also adopted the following methodology set out in the Bradshaw case:

… a methodology to adopt is to first consider the testimony of a witness on a ‘stand alone’ basis followed by an analysis of whether the witness’s story is inherently believable. Then, if the witness’s testimony has survived relatively intact, the testimony should be evaluated based on the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the “preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions” …

The adjudicator commented that “the most helpful evidence in this case is the documents created at the time of events. These provide the most accurate reflection of what occurred, rather than witnesses’ memories that have deteriorated through the passage of time, hardened through this proceeding, or been reconstructed. I have used contemporaneous emails between [several individuals].” However, the adjudicator placed little reliance on external communications to clients:

In my experience, professional emails to clients – whether to introduce [the employee] to clients as a travel agent, respond to a complaint, or to notify clients of her departure from the company – are diplomatic, by nature, and intended to promote business interests. I cannot reliably use them to determine what actually transpired or what the author of the email was actually thinking.

The adjudicator concluded that the employee “was not candid in her testimony when an answer would not necessarily assist her case. She clearly had command of the situation, and shifted her answers as the questions developed.” In comparing the testimony of the employee and the co-owner, the adjudicator commented that the employee, when describing arguments that arose between them, had a tendency to exaggerate the reactions of the co-owner while, at the same time, downplay her own … [The co-owner’s testimony was] more forthright and credible. [She] acknowledged reacting emotionally during arguments with [the employee]. She also provided details that could be adverse to her case. [She] testified feeling “annoyed” and “irritated” with [the employee.] … Unlike [the employee], [she] acknowledged the limits of her memory even when it was not in her interest to do so (i.e. her lack of specificity could be adverse to her, and there was no documentary record to test the accuracy of her recollection).
In dismissing the complaint, the adjudicator stated that in cases such as this, a
connection between the prohibited ground and the termination is often
established from “reasonable inferences drawn from surrounding circumstances …”

In supporting or negating such an inference, the Tribunal takes into account
the temporal relationship between the pregnancy notice, or leave of
absence, and the termination of employment. [The employee] was fired
approximately three weeks after notifying her employer that she was
pregnant, and one day after returning from a pregnancy-related leave of
absence from work. In my view, the timing of the termination strengthens an
inference that her pregnancy was a factor.

The Tribunal also takes into account the temporal relationship between the
pregnancy notice, or leave of absence, and the timing of the decision to
terminate … In my view, the timing of the decision to terminate [the
employee’s] employment (as opposed to the day the message was
communicated to her) does not support a reasonable inference that [the
employee’s] pregnancy or pregnancy-related leave of absence was a factor
in the termination of her employment.

In conclusion, the adjudicator stated that the circumstantial evidence did not give
rise to a reasonable inference that the employee’s pregnancy, or pregnancy-
related leave of absence, was a factor in the employer’s decision to terminate the
employee’s employment.

Establishing the connection between a prohibited ground of discrimination and an
employer’s alleged improper actions is considered in sections 14:330 and 14:410
of the *Illness and Absenteeism* manual, commencing at pages 518 and 562
respectively.

Subscriber-Only Manual Supplement for April

The May update of the Manual Supplement has now been 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 password assigned to the subscriber.

Potential subscribers can preview the cumulative supplement until June 15,
2014 by clicking here.
About Illness and Absenteeism

A picture of the manual. 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.