

THE DISABLED EMPLOYEE

PART I

THE LAW OF ACCOMMODATION

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1. INTRODUCTION

This paper aspires to provide some insight and guidance with respect to the management of the disabled employee. We acknowledge from the outset that it would be impossible to cover all of the diverse issues and situations arising in this area within the limited scope of this paper. We will deal with the general duty to accommodate disabled employees as prescribed under the Ontario *Human Rights Code*. We will then focus on the accommodation of employee absenteeism and will provide information concerning various practical issues which arise in dealing with employee absences.

2. ACCOMMODATION OF DISABLED EMPLOYEES

(a) THE CODE

Purpose of Human Rights Legislation

The preamble to the Ontario *Human Rights Code* (R.S.O. 1990, c. H. 19) (the “Code”) provides as follows:

“...it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.”

It is recommended that this purpose be kept in mind when making employment decisions

which may involve human rights considerations.

Right to Freedom from Discrimination in Employment

Subsection 5.(1) of the Code generally prohibits discrimination in employment based on enumerated prohibited grounds and provides as follows:

“Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or **handicap**.”

Pre-Employment Discrimination

Section 23 of the Code addresses discrimination arising prior to hiring employees, and precludes employers from indirectly or directly classifying qualifications for a job candidate by *inter alia* handicap in an employment advertisement (23(1)). The section further prohibits an employer from making such classifications on an application form or by written or oral inquiry (unless permitted under the Code)(s. 23(2)).

Indirect Discrimination

Section 11 of the Code specifically precludes what is termed “constructive discrimination” and has also been referred to as indirect or adverse impact discrimination. Such discrimination takes place where a “requirement, qualification or factor” exists which is not *per se* discriminatory on its face, but results in the “exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member.” The distinction between direct and indirect discrimination will be addressed more fully below.

The rights to freedom from discrimination stipulated in the Code are not absolute rights;

there are certain exceptions found in the Code. One such example is found in section 25(3)(a) of the Code which provides that the right to freedom from discrimination in employment is not infringed: “where a reasonable and bona fide distinction, exclusion or preference is made in an employee disability or life insurance plan or benefit because of a pre-existing handicap that substantially increases the risk.”

(b) DEFINITION OF HANDICAP

“Handicap” is one of the enumerated grounds upon which discrimination is prohibited. The term “because of handicap” is defined (but not exhaustively) in the Code as follows:

““because of handicap” means for the reason that the person has or has had, or is believed to have or have had,

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

The definition of handicap is a broad one, and the case law supports a broad application of this term. Courts and tribunals have considered various illnesses and determined whether they fall under the definition of handicap in the Code. For example, the following conditions have been held

to be handicaps for purposes of the Code:

-asthma (*Kolev v. McDonnell Douglas Canada Ltd.* (1992), 18 C.H.R.R. D/213 (Ont. Bd. Inq.));

-hypertension (*Horton v. Niagara (Regional Municipality)* (1987), 9 C.H.R.R. D/4611 (Ont. Bd. Inq.));

-alcoholism (*Entrop v. Imperial Oil Limited*, (2000) 50 O.R. (3d) 18); and

-obesity (when it either limits or perceives to limit the individual's physical abilities.) (*Ontario (Human Rights Commission) v. Vogue Shoes* (1991), 14 C.H.R.R. D/4611).

The disability need not be “ongoing” in order to constitute a handicap under the Code. An arbitrator in Ontario recently found that an employee was ‘handicapped’ as defined by the Code at the time she suffered a heart attack and during her convalescence. The considerable absence caused by the heart attacks and related surgery was sufficient to find that the employee was handicapped during her absence. The arbitrator did not address the more difficult question of whether the employee’s handicap status would continue after the period of convalescence ended. (*Re Mains Ouvertes-Open Hands Inc. and Ontario Public Service Employees Union, Local 458*).¹

¹(2000) 86 L.A.C. (4th) 175 (Weatherhill)

The Supreme Court of Canada has broadened the definition of “handicap” to include individuals perceived to have functional limitations although, in fact, they have none.² The Supreme Court stressed the importance of focussing on the “effects of the distinction” rather than the “cause or origin of the handicap”, explaining as follows:

“It is important to note that a “handicap” may exist even without proof of physical limitations or the presence of an ailment. The “handicap” may be actual or perceived and, because the emphasis is on the effects of the distinction, exclusion or preference rather than the precise nature of the handicap, the cause and origin of the handicap are immaterial. Further, the *Charter* also prohibits discrimination based on the actual or perceived possibility that an individual may develop a handicap in the future.”

The Supreme Court’s definition of handicap encompasses situations where an individual is discriminated against based on a “perception” that the individual may develop a handicap in the future.

(c) DEFENCE TO DISCRIMINATION

The extent of a disabled employee’s right to freedom from discrimination is not unlimited. The Code affords employers protection enabling them to treat disabled employees differently than other employees in certain circumstances. Section 17 of the Code provides that an employer does not infringe an employee’s rights under the Code by reason of handicap where the employee is “incapable of performing or fulfilling the essential duties or requirements” of the employee’s position.

However, an individual cannot be found to be incapable of performing or fulfilling his or her “essential duties or requirements” unless the needs of the employee cannot be accommodated short of “undue hardship” on the part of the employer. Section 17 of the Code states:

²In the recent decision of Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), [2000] 1 S.C.R. 665 (“*Boisbriand*”)

“17(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

(2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.”

Accordingly, the following factors must be considered in determining whether an employer has accommodated a person to the point of undue hardship:

- 1) cost;
- 2) outside source of funding (if any); and
- 3) health and safety requirements (if any).

The *Guidelines for Assessing Accommodation Requirements for Persons with Disabilities*, released by the Ontario Human Rights Commission in August, 1989 (The “Guidelines”), provides further guidance as to what constitutes “undue hardship.”

The Guidelines are not “law” per say but offer general guidance regarding principles and procedures to be followed when accommodating an employee. The Guidelines stress that individuals must be accommodated “in a manner which most respects their dignity, if to do so does not create undue hardship.” The expression “respects their dignity” is defined as “a manner which recognizes the privacy, confidentiality, comfort, autonomy, and self-esteem of persons with disabilities, which maximizes their integration and which promotes their full participation in society.” Even in cases where immediate accommodation may constitute undue hardship, the possibility of spreading the financing of accommodation over time (i.e. by taking loans, the issuance of shares or bonds) or the phasing in of accommodation or the establishment of a reserve fund should be considered.

The Guidelines provide guidance in the analysis of undue hardship in respect of the two issues of “cost” and “health and safety.”

(i) Cost Considerations

The Guidelines provide that the costs of accommodation will only constitute undue hardship if they are:

1. quantifiable;
2. shown to be related to the accommodation; and
3. (a) so substantial that they would alter the essential nature of the enterprise, or (b) so significant that they would substantially affect the viability of the enterprise.

The Guidelines provide the following examples of types of financial costs of accommodation: (a) capital and operating costs; (b) the costs of additional staff time, beyond what can be accomplished through restructuring existing resources and job descriptions, in order to provide appropriate assistance to the person with a disability; and (c) any other quantifiable and demonstrably related costs.

The Guidelines further list the following factors which will be considered when determining whether a cost would “alter the essential nature” or “substantially affect the viability of the enterprise”:

- “(a) the ability of the person responsible for accommodation to recover the costs of accommodation in the normal course of business;
- (b) the availability of any grants, subsidies or loans from the federal, provincial or municipal government or from non-government sources which could offset the costs of accommodation;

(c) the ability of the person responsible for accommodation to distribute the costs of accommodation throughout the whole operation;

(d) the ability of the person responsible for accommodation to amortize or depreciate capital cost associated with the accommodation according to generally accepted accounting principles;

(e) the ability of the person responsible for accommodation to deduct from the costs of accommodation any savings that may be available as a result of the accommodation, including:

- (i) tax deductions and other government benefits;
- (ii) an improvement in productivity, efficiency or effectiveness;
- (iii) any increase in the resale value of property, where it is reasonably foreseeable that the property might be sold;
- (iv) any increase in clientele, potential labour pool, or tenants; and

(f) the availability of the workplace safety and insurance board's "second injury and enhancement fund".

To make a case of undue hardship, one must provide evidence of objective and accurate cost estimates of accommodation and one must show that there were no alternative means of accommodation available which would not cause undue hardship:

"Where undue hardship is claimed, cost estimates will be carefully examined to ensure that they are not excessive in relation to the stated objective, and to determine whether a less expensive alternative exists which could accomplish the accommodation while still fully respecting the dignity of the person with a disability."

It is recommended that detailed documentary evidence regarding costs of possible accommodation be kept to form the basis of a potential case of undue hardship in the future.

(ii) *The Guidelines: Health and Safety Considerations*

The Guidelines provide the following standard regarding the test of undue hardship as it

relates to health and safety considerations:

“Undue hardship will be shown to exist where a person responsible for accommodation is subject to or has established a bona fide health or safety requirement and the person has attempted to maximize the health and safety protection through alternate means which are consistent with the accommodation required, but the degree of risk which remains after the accommodation has been made outweighs the benefits of enhancing equality for disabled persons.”

The term “benefits of enhancing equality” involves the “consideration of benefits from the accommodation which may accrue to a person’s co-workers, family, friends, fellow students, or the general public by the accommodation being made.”

The Guidelines set out the following factors which are relevant to considerations of health and safety risks:

- “(a) the willingness of a person with a disability to assume the risk in circumstances where the risk is to his or her own health or safety;
- (b) whether the modification or waiving of the requirement is reasonably likely to result in a serious risk to the health or safety of individuals other than the person with a disability;
- (c) the other types of risks which the person responsible for accommodation is assuming within its enterprise; and
- (d) the types of risks tolerated within society as a whole, reflected in legislated standards such as licencing standards, or in similar types of enterprises.”

When determining whether there is a serious risk pursuant to point (b), the following factors will be considered:

- “(a) the nature of the risk: what could happen that would be harmful?
- (b) the severity of the risk: how serious would the harm be if it occurred?
- (c) the probability of the risk: how likely is it that the potential harm will actually occur? Is it a real risk, or merely hypothetical or speculative? Could it occur

frequently?

(d) the scope of the risk: who will be affected by the event if it occurs?"

Objective evidence is required to prove undue hardship (i.e. facts, figures, and scientific data); it is insufficient to simply make mere statements that the cost or risk of accommodation is too high. The employer is urged to assemble as evidence: existing scientific information, empirical data, expert opinions (including medical opinions) based on facts and data, and detailed information about the nature of the job, service, or activity, and about the effect of the conditions on the person with a disability or the group of which the person is a member.

Employers must be aware that considerations as to “business inconvenience” or “undue interference” with the enterprise are **not** relevant factors to be considered in determining undue hardship (although costs attributable to decreased productivity can be considered in the “cost” consideration.) Customer or other third party preference also cannot be considered in assessing undue hardship.

While the Guidelines provide very detailed information regarding requirements to accommodate an employee to the point of undue hardship, the case law in this area has not always reflected these stringent requirements.

For example, although the Guidelines specify that it is inappropriate to consider “undue interference” into the operation of business and that collective agreement obligations cannot operate to bar accommodation, the courts have held otherwise. The Supreme Court of Canada has determined that disruption in a collective agreement can be a factor to consider in a determination of undue hardship.

In Alberta Human Rights Commission v. Central Alberta Dairy Pool; Canadian Human

*Rights Commission et al., Interveners*³, the Supreme Court provided the following list of factors which may be relevant to a consideration of a determination of “undue hardship”:

- financial cost (this may be influenced by the size of the employer’s operation);
- disruption of a collective agreement;
- problems of morale of other employees;
- interchangeability of work force and facilities;
- where safety is at issue “the magnitude of the risk and the identity of those who bear it.”

³(1990) 72 D.L.R. (4th) 417

The Supreme Court has further clarified that a disruption of the collective agreement must be substantial and must be based on “well-grounded concerns” that other employee rights will be effected by the accommodation. The Court explained that: a “substantial departure from the normal operation of the condition and terms of employment in the collective agreement may constitute undue interference in the operation of the employer’s business.” (*Central Okanagan School District No. 23 v. Renaud*⁴)

The issue of an employer’s duty to accommodate to the point of undue hardship was recently revisited and overhauled by the Supreme Court of Canada.

(iii) Divided Approach to Disability

Until a recent Supreme Court of Canada decision, the courts treated discrimination cases differently depending on whether the discrimination was considered to be direct or indirect (adverse impact) discrimination. Direct discrimination arises from decisions, practices or policies which resulted in disadvantage to a protected group under the Code, and may be intentional or unintentional. Indirect (or adverse impact) discrimination focusses on the effect of the conduct of an employer. Employer decisions, practices and policies adopted for plausible reasons will be found to be indirectly discriminatory if they exclude, restrict or are otherwise harmful to employees belonging to protected groups under the Code (i.e. a rule which causes an employee to lose seniority rights due to absence by reason of their disability).

The basis for the prohibition against “indirect discrimination” in s. 11 of the Code is as follows:

⁴(1992) 95 DLR (4th) 577)

“11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.”

This provision provides for a defence to discrimination where the requirement is “reasonable and bona fide” in the circumstances, provided that the needs of the group discriminated against cannot be accommodated to the point of undue hardship.

Despite the fact that the distinction between direct and indirect discrimination has often been blurred, and the policy basis for the distinction unclear, until recently, the courts treated these two types of discrimination very differently.

In cases of direct discrimination, where an employer could establish the defence that the requirement in question was a “good faith occupational qualification or requirement” of the position, the duty to accommodate an employee was not applicable. In other words, the courts interpreted the defence in the Code in such a way that if the requirement was a “good faith occupational qualification or requirement,” the employer had no duty to accommodate the employee.

On the other hand, in cases of indirect discrimination, the employer had a duty to accommodate the employee to the point of undue hardship. In effect, the duty to accommodate

became the defence to an employer in such situations, and the statutory defence of good faith occupational qualification or requirement fell by the wayside.

The Supreme Court in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*⁵ (hereinafter the “Meiorin decision”) eliminated the divergent approach to discrimination and established an integrated approach to this issue. The approach involves equal treatment by courts of all disability cases, regardless of the nature of the discrimination. Further, the approach blends the two statutory concepts of accommodation and bona fide occupation requirement/qualification into one unified defence in cases of both direct and indirect discrimination.

In the *Meiorin* decision, the Supreme Court set out a test to be considered where a policy, rule or standard was found to be discriminatory. In order for the employer to justify the standard on the grounds of a good faith occupational requirement or qualification defence, the employer must establish:

1. that the employer adopted the standard for a purpose rationally connected with the performance of the job;
2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of the legitimate work-related purpose; and
3. that the standard was reasonably necessary to the accomplishment of that legitimate

⁵[1999] 3 S.C.R. 3

work-related purpose.

To show that the standard was reasonably necessary, the employer must demonstrate that it was impossible to accommodate the employee or other individual employees sharing the characteristics of the employee without experiencing undue hardship.

The Supreme Court held that in order for an employer to determine whether it has accommodated an employee to the point of undue hardship, the employer should consider the following questions:

“Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

If alternative standards were investigated and found to be capable of fulfilling the employer’s purpose, why were they not implemented?

Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

Is there a way to do the job that is less discriminatory while still accomplishing the employer’s legitimate purpose?

Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

Have the parties who are obliged to assist in the search for possible accommodation fulfilled their roles?...the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union.”

The Supreme Court stressed that disability cases must be considered on an individual basis, considering the unique nature of each situation, explaining as follows:

“The skills, capabilities and potential contributions of the individual claimant and

others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.”

This decision has greatly impacted the status of human rights law. The distinction between direct and indirect discrimination is no longer of consequence, and the Court provided further guidance regarding the test to determine whether an employee has been accommodated to the point of undue hardship.

The Meiorin decision was applied in the recent Ontario Court of Appeal decision of *Ministry of Community and Social Services and Grievance Settlement Board and Ontario Public Service Employees Union* (cite). In this decision, the employee claimed that his employer’s Religious Observance Policy (the “Policy”) discriminated against the employee and the employer failed to accommodate the employee to the point of undue hardship. As a member of the Worldwide Church of God, the employee was required to observe eleven holy days over the calendar year. The Policy allowed for two days off with pay for religious observance purposes and further permitted scheduling changes where possible. One scheduling alternative was to permit employees to work a compressed work week and then to take one day off at the end of a three week period. If scheduling accommodations were insufficient, the Policy permitted employees to use their earned entitlements (i.e. vacation credits and overtime, or seek unpaid leave). Employees were further required to take off a minimum of five “social contract days” without pay.

To accommodate the employee, the employer suggested the use of the five social contract days for religious observance. Further, the employee was able to use the compressed work week scheduling option. Although this option only permitted employees to take one day off after a three week period (which would not allow for the employee in question to observe his religious holidays as necessary) the employer permitted the employee to bank the days available to him through the compressed schedule, and then use the days off as required for religious purposes.

The employee took the position that none of the options presented to him were acceptable

and that the five social contract days and the days available to him through schedule changes were for him to use as he saw fit and that he should not be required to use these days for religious purposes. The employee (who had received two days off with pay under the Policy) was seeking reimbursement for the nine further religious days he was required to use for religious observance.

The Grievance Settlement Board (the “Board”) allowed the grievance in part, ordering that the employee be reimbursed for four of the nine holy days in question. The Board rejected the employee’s position that he was not required to use the social contract days for religious observance purposes. With regard to the days earned through the compressed work option, the Board found that these days were “vacation benefits” and that the employee was not required to use these days for religious purposes. The arbitrator’s decision was upheld at the Divisional Court.

The Ontario Court of Appeal reversed the decision of the Divisional Court and found that the Board’s characterization of days off due to scheduling changes as “vacation benefits” was patently unreasonable. The employer had fully met its duty to accommodate the employee by permitting the employee the options made available for religious observance. The employee could have used the days off available to him for religious purposes without hardship or inconvenience.

The Court held that: “employers can fulfill their duty to accommodate by offering appropriate scheduling changes, without first having to show that granting a leave of absence with pay would result in undue economic or other hardship.” The Court stressed that in certain cases, accommodation through scheduling changes may be the most reasonable form of accommodation, explaining that: “If feasible, it enables employees to observe their religious holy days without loss of pay and without having to encroach on pre-existing earned entitlements, while at the same time completing their assigned hours of work, thereby relieving the employer from having to pay them for days on which they provide no service.”

This Court of Appeal decision reflects the court’s interest in striking a balance between the

needs of the employee and the employer's need to conduct its affairs. It reflects the realities of the workplace, and appears to reach a solution of compromise between the parties. The Court recognized the employer's efforts to enable employees to observe their religious commitments and felt that these efforts provide reasonable options to the employee. The Court explained:

"I am satisfied that the Employer was clearly mindful of its obligation to recognize and respect the right of every employee to practice his or her religion without discrimination. To this end, the Policy provided for measures designated to accommodate the individual needs of members of minority religions. Foremost amongst these was the Employer's willingness to institute scheduling changes so that employees could fulfill their religious obligations without having to lose wages or encroach on pre-existing earned entitlements such as vacation time."

As such, it appears that a well thought out, reasonable and flexible policy to accommodate employee's religious obligations may be sanctioned by the courts, provided that the policy does not cause employees to lose wages or pre-earned entitlements.

(iv) Examples of Undue Hardship

The following are examples of situations where courts have upheld an employer's defence of undue hardship:

◆ ***Canada Post Corporation (Godbout)(1993) 32 LAC (4th) 289 (M.G. Picher)***

A postal worker employee was off work for several years due to a permanent back injury, and for several months prior to his full-time absence, he was only able to work part-time modified duties. The employee was terminated after the employee received a series of medical assessments which estimated that the grievor would never be able to return to full time or modified duties and that the grievor's condition would not improve. The arbitrator found that the grievor was basically restricted from performing the entire spectrum of a postal worker's usual activities in a mail processing plant.

The arbitrator found that "the corporation is not under any obligation to create an occupation for the grievor in the nature of performing duties which are entirely

foreign to those for which he was hired and which may be of little economic benefit to it.” The arbitrator further explained that an employer is not required to “assemble a number of unrelated sedentary duties for the sole purpose of filling an employee’s day without regard to the significance of its production requirements.” The arbitrator also found that there would be a problem with disruption of the collective agreement if the grievor were to bump more senior employees. Also, stripping senior workers of there more sedentary tasks would likely lead to morale problems.

◆ ***Re Hamilton Civic Hospital and C.U.P.E., Local 794 (1994), 44 L.A.C. (4th) 31***

The grievor suffered a recurring elbow injury which required surgery and caused the employee to be absent for a period of about thirteen months prior to her termination. The employer made five unsuccessful attempts to place the grievor on modified duties. The attempts made to rehabilitate the employee were based on the employee’s restrictions as defined by her physician, however, none of these attempts were successful. The grievor was terminated after receipt of a medical report which indicated that the grievor had reached her maximum medical rehabilitation, and the doctor could not think of any other treatment to significantly alter her function. Upon receipt of this report, the employer concluded that the grievor had a permanent disability and was chronically absent and decided to terminate the employee.

The Arbitration Board upheld the termination of the employee on the grounds that the grievor could not perform any existing jobs, nor could a useful or productive job be created for the grievor and the employer is not required to create a job which would not be useful or productive. The Board further explained that the employee’s union is required to assist in the accommodation process, and should make suggestions as to accommodations which would have any reasonable potential for success.

◆ ***National Steel Car Limited and U.S.W.A. Local 713S (Milkovic) (1997), 64 LAC (4th) 242 (Rose)***

The grievor suffered a workplace injury to his right elbow, which limited the grievor such that he was unable to perform certain repetitive motions. The grievor was accommodated by being placed in a janitorial position and being assisted with heavy mopping. The employer made two efforts to place the grievor in a painting position, but the employee was unable to perform the duties and returned to modified work as a janitor. When cutbacks were made to staff, the grievor (the most junior janitor) was laid off.

The arbitrator held that the employer had accommodated the grievor to the point of undue hardship. Based on the evidence, the janitor position was the only modified job that the grievor could perform. The grievor lacked the seniority to bump employees in another department. The grievor was laid off due to major downsizing, but would be the first recalled to the department.

(v) *Examples of Undue Hardship Rejected*

The following are examples of situations where courts have rejected an employer's defence of undue hardship:

◆ ***Central Okanagan School District v. Renaud* [1992] 2 S.C.R. 970**

The grievor was required to work Friday nights (contrary to his religion). After attempts to accommodate were made, the grievor was terminated. The accommodation attempts included the creation of a Sunday to Thursday shift (which required consent of the union but which was denied). The Court found that the employer did not sufficiently check into alternatives for the employee. Further, since the union had failed to examine the impact of accommodation on other employees and failed to be flexible in the application of the collective agreement, the union was jointly liable with the employer.

◆ ***British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union* [1999] 3 S.C.R. 3**

The grievor was a female firefighter who was terminated when she failed to meet a new aerobic standard established by the B.C. government for minimum fitness standards although her past performance was satisfactory. The Court found that the employer failed to establish that it had accommodated the employee to the point of undue hardship. There was no evidence of a safety risk posed by the employee; the rights of other firefighters were not affected by the grievor (morale was not a factor); and no evidence of costs of accommodation was presented by the employer.

Whether an employer has accommodated an individual to the point of undue hardship is difficult to determine. The courts will make this determination on a case-by-case basis, based on a consideration of all of the relevant facts of the situation. It is recommended that a lawyer be consulted to assist the employer in its determination as to whether it has accommodated an employee

to the point of undue hardship.

(d) ROLE OF OTHER PARTIES IN THE ACCOMMODATION PROCESS

(i) *Employee's Obligations*

It is not only the employer who has responsibilities *vis-à-vis* the accommodation of a disabled employee. The affected employee also has certain obligations. The Guidelines specify that the person requiring accommodation has a “responsibility to communicate his or her needs in sufficient detail and to co-operate in consultations to enable the person responsible for accommodation to respond to the request.”

While an individual is not required to disclose private or confidential information, he/she should make his or her needs known for a proper assessment to be completed. An employee is obliged to answer questions which are within his or her knowledge and ability to answer with regard to the particular circumstances or equipment required in the specific situation.

The employee's obligation to cooperate with the employer in respect of the accommodation of his or her disability is especially important in cases of alcoholism (a treatable illness). There is an onus on the individual to attempt to obtain assistance with respect to this disability.

(ii) *Union's Obligations*

In unionized workplaces, the employee's union is also required to assist with the accommodation of the employee. Accordingly, matters of accommodation should be handled in consultation with the union. It is also recommend that matters of accommodation be discussed with the union and a standard protocol be established before individual incidents arise.

Human rights legislation and collective agreement provisions can conflict resulting in difficulties for all parties to agree on the best means for accommodation. Employers and unions should take special care to consider existing collective agreement provisions which may be contrary to human rights law, and consider amending the provision on a consensual basis to pre-empt future legal problems. (For example, collective agreement provisions which provide for the loss of an employee's seniority rights during an employee's absence because of disability have been considered discriminatory under the Code. (*Ontario Nurses' Association and Etobicoke General Hospital, et al.*⁶)

PART II

PRACTICAL APPROACHES TO DEALING WITH EMPLOYEE ABSENTEEISM

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1. INTRODUCTION

A universal problem confronting employers today is excessive employee absenteeism. According to Watson Wyatt's 2000 Canadian Staying@Work survey, a comprehensive survey of absence and disability management practices, employee absenteeism is having a greater impact on the bottom line than ever before. Direct disability and absence management costs are now 7.1% of payroll, up from 5.6% in 1997.

According to this year's survey, short-term absence costs, as a percentage of total payroll costs, have more than doubled from 2% in 1997 to 4.2% in 2000. Long-term disability costs, as a

⁶(1993), 14 O.R. (3d) 40 (Div. Ct)

percentage of total payroll costs, have increased by 8% since 1997. Watson Wyatt estimates that the average direct costs of employee absenteeism in Canada is now \$3,550 per employee per year.

We will be focussing on three types of absences which Canadian employers regularly face: the endless absence, the frequent absence, and the “stressed out worker” absence.

We will not be dealing with absences caused by work-related injury as these cases must be dealt with separately. The relevant workers’ compensation legislation must be reviewed to determine the rights of workers who fall under this category.

The endless absence occurs in situation where an employee is off on long term disability and no one has heard hide or hair of her. Generally, the employee has not maintained contact with the employer, but her employer continues to pay for all of her group benefit premiums. At this point, employers question whether they must continue to provide benefits and if the employee does return, do they have to rehire her.

The frequent absence occurs when your employee is absent from work more than the average employee. For example, Sally was absent from work 60 days last year and 50 days the year before. In these situations, employers generally question whether they can warn Sally that she will be fired if there is no improvement in her attendance record for this year.

Absences of three or four days at a time effect employers in significant ways: the absences are unpredictable and are difficult to plan for which results in situations where a replacement worker in not available and co-workers are required to pick up the slack for the absent employee inturn creating a stressful situation for committed employees.

The Stressed out worker absence occurs in situations when the employer tries to address a poor attitude or performance issue with an employee and thereafter the employee immediately calls in ‘sick’. In these situations, a doctor’s note generally states that the employee is suffering from “stress” and employers question whether they have to accept the medical certificate.

These examples are familiar to most employers. The key is knowing how to deal with these situations. The first step is preventative; implement programs to decrease absenteeism, and possibly reward good attendance. The second step and most problematic is dealing with the current offenders.

2. **ATTENDANCE POLICIES AND ATTENDANCE MANAGEMENT PROGRAMS**

(1) ATTENDANCE POLICY

Organizations may reduce the costs associated with employee absenteeism through the implementation of effective absence management. The first positive step an employer can take in the management of employee absences is to review their attendance policy.

There is a difference between innocent absences and culpable absences. Innocent absenteeism is absenteeism caused by illness, injury or legitimate health reasons. Culpable absenteeism is characterized by such conduct as taking unapproved days off, reporting sick for work yet attending social functions, oversleeping, or any conduct that has blameworthiness attached to it. Disciplinary measures are not an appropriate employer response to innocent absenteeism. Conversely, culpable absenteeism amounts to a disciplinary offence warranting discipline up to discharge where the circumstances warrant in accordance with the principals of progressive discipline. Employers must be careful not to confuse the two types of absenteeism. It is suggested that the attendance policy not take the form of a disciplinary policy. Cases involving instances of culpable absenteeism should be dealt with under the employer's progressive discipline policies.

The attendance policy should be a *written* policy which all employees are aware of and becomes a term and condition of each employee's employment with the company. The policy can take the form of an addition to the employee handbook, a memorandum to staff, or be placed in the benefits booklet or personnel manual. While the attendance policy will speak in detail of the amount of benefit each employee will be entitled to, more importantly, it must also set out the *rules* of

absences at the workplace.

In a situation where the employment of the employees is governed by a collective agreement, an employer must take extra precaution. While there is no question that an employer has the right to adopt and attendance management policy and program, the employer must take care to ensure that the policy also conforms with, and not be inconsistent with, the provisions of any collective agreement. It may be useful for the employer to consult with the union in the drafting and implementing of such a policy.

Clear information for reporting absences must be provided to the employees. The policy should outline the course of action needed to report an absence from work for whatever reason. Included in the policy should be detailed instruction dealing with: when should an employee call about an absence; who should the employee call; and what information should the employee provide on his/her absence including the reason for the absence, the anticipated return-to-work date and what provisions have been made to cover the employee's duties.

The policy should clearly set out when a medical certificate or verification will be required to prove the existence of the illness or disability. Generally speaking, written certification is often required after three or five days of absence. However, the policy should also specify that the employer retains the right to require medical certification after shorter absences and that the certificate must be in a form acceptable to the employer. (Medical certifications will be dealt with in more detail, below.)

The attendance policy may also address the possibility that a second medical opinion may be required. As a general rule, employers are not entitled to conduct an independent medical examination in order to verify the accuracy of a medical certificate produced from the employee's own doctor, or to verify an illness or disability. However, an employee may submit to a medical examination or provide confidential medical information if the employer receives the employee's consent or such is expressly provided in a collective agreement.

In union settings, generally arbitrators have held that unless there is specific statutory authority or a specific provision in the collective agreement, the employer may not require the employee to submit to a medical examination by a doctor of the employer's choosing.

The policy must state that as a precondition for the employee to be entitled to any sick benefits, the terms of the policy must be adhered to.

(b) MEDICAL CERTIFICATES

Often when an employer is presented with a medical certificate from the employee's family physician, it reads something like this:

*"Johnny is under my care and will not be able to attend work due to illness for two weeks.
Dr. X"*

While notes from Epstein's mother were funny in *Welcome Back Kotter*, notes lacking in detail are anything but for the employer. The employer does not have to accept such vague statements and may ask for specific details.

The most common complaint employers voice is that physician's note does not speak to what the employee is suffering from. Human Rights Commissions, both provincially and federally, hold the view that the employer has no need to know precisely what the employee is suffering from. All that an employer has the right to know is whether the employee is disabled from working for some medical reason. The employer should not demand to know what the diagnosis is for the employee.

The employer may request a medical certificate from a practising physician experienced in the medical condition causing the employee's absence which contains the following information:

- a) date seen by physician;
- b) nature of illness;

- c) type of treatment recommended;
- d) dates absent from work due to illness; and
- e) prognosis as to when the employee can be expected to return for work and what, if any, duties the employee might be expected to perform in the future.

It is important that the requirement of providing a medical certificate to establish the basis for the absenteeism be applied consistently. All supervisors should be aware of the requirement and enforce it.

If it appears that the employee will be absent for more than a week, the employer may request further information of the physician. To that end, I recommend sending a copy of the employee's job description to the physician and inquiring as to whether the employee is able to do some or all of the listed functions, or whether the employee can perform the job with some restrictions or limitations. Also, an employer may wish to request information as to whether the employee is undergoing a course of medical treatment designed to ensure a return to work as soon as possible, as well as requesting information as to when it is expected that the employee will be likely fit to return to work.

(c) ATTENDANCE CONTROL

Supervisors and managers should make a habit of monitoring employee attendance. Every absence should be noted. Monitoring attendance will assist in detecting work attendance problems. Also, it will provide assistance to employees and encourage them to address attendance issues. Managers must deal with problem attendance in a fair and consistent manner.

The type of information that an employer should record includes whether any notice was given prior to the absence from work, the explanation given for the absence and any mitigating factors that should be taken into consideration.

It is important for the employer to implement an effective system for tracking the absenteeism rate. Such information is crucial in determining whether a particular employee fits into the “above average” percentage of absentees at the workplace. The tracking system should be broken down by job classification and include information as to the employee’s gender and age.

Regular evaluation should also be conducted as it will ensure that employees are aware of their attendance record and it will enable supervisors to deal with the issue of absenteeism before it becomes a significant problem. Moreover, documenting any previous disciplinary measures and warnings given to an absentee employee will be helpful to the employer in the event that just cause for termination must be proven.

Finally, supervisors and managers should be aware of the duty to accommodate and the definition of handicap under the Code in order that they identify and deal appropriately with employees who may be absent for reasons that would constitute a prohibited ground under the Code – the best defence is a good offence.

(d) RETURN TO WORK PROGRAMS

Employers are familiar with the concept of early return to work programs as a means of fulfilling their obligations under the *Workplace Safety and Insurance Act*. Return to work programs reduce costs and provide an environment which is conducive to the rehabilitation of the employee. Such programs are also indicative of the employer’s attempts to accommodate injured or disabled employees.

Once an employee has advised that he is fit to return to work, an employer may request a valid medical certificate of fitness. The employer has a right to reject such a certificate and require additional information if it is not satisfied that the employee presents no danger to himself, to other

employees, or to the public. If the employer has reasonable cause to believe that the employee is unfit to work or that the medical information is not valid, he may refuse to permit the employee to return to work.

A disabled worker is obliged to advise the employer of the need to be accommodated and to further advise as to what is required in order to accommodate his or her disability.

When designing a return to work program, the following provisions should be included:

- constant contact with the absent employee;
- ongoing evaluations of the employee’s medical capabilities;
- identification of any modified work opportunities;
- establishment of employee assistance programs, counselling and rehabilitation; and
- regular attendance expectations during the return to work period and consistently thereafter.

(e) SURVEILLANCE EVIDENCE

When an employer suspects that an employee is misusing sick leave to avoid his/her obligations to attend work, an employer sometimes resorts to retaining a private investigator to gather surveillance evidence regarding the employee’s activities.

Before resorting to covert surveillance in order to determine whether the illness or disability is legitimate, the employer should first request that the employee provide a consent to release medical information to the employer. Medical information should be obtained through the employee’s own physician to assess the nature of the illness and disability, the treatment and prognosis and whether there is a possibility that the employee will return to work in the future. If the employer is suspicious, he should warn the employee of his suspicions and confirm that misuse

of sick leave will not be tolerated and that misuse of sick leave is grounds for immediate dismissal for cause. Finally, the employer should request that the employee submit to an independent medical examination by a physician chosen by the employer.

If the surveillance evidence confirms the employer's suspicions, it often results in dismissal of the employee. Whether an employer may introduce the surveillance evidence at a subsequent arbitration in order to justify the dismissal is never a given. In some cases the evidence has been admitted, in others it has been ruled inadmissible as it infringes upon the employee's right to privacy.

3. DEALING WITH ABSENT EMPLOYEES

(a) THE ENDLESS ABSENCE

In some circumstances, a point may be reached where an employer becomes entitled to terminate an employee even though the employee has not done anything blameworthy. This point is reached when an employee's condition can be found to "frustrate" the contract of employment. An employment contract is deemed to be frustrated when there is no hope of the employee being able to perform his or her duties in the foreseeable future. Frustration of contract involves events outside the control of either party. This is different than terminating an employee's employment for "just cause". Just cause involves situations whereby the employee, by her misconduct or behaviour has nullified or voided the employment relationship by incompetence, negligence of duty, wilful disobedience, or serious misconduct. In these situations, an employer is entitled to terminate the employee's employment without notice or compensation.

Pursuant to human rights legislation, termination of the sick or disabled employee on the grounds of illness is prima facie discriminatory and, as such, the employer may have a duty to accommodate the return to work of the employee. When applying the doctrine of "frustration of employment" in respect of an employee's medical condition, an employer must establish that due to

the employee's medical condition, the employee cannot perform the essential duties of his or her employment and it is unlikely that the employee will be able to perform these duties in the foreseeable future. It must be further established that the employer has attempted to accommodate the employee to the point of undue hardship.

As we have already explored in part one of this topic, there are three principal factors to consider when seeking to establish undue hardship: the cost of the accommodation, the availability of outside funding to help offset those costs, and health and safety implications.

It is very difficult to determine when an employment relationship has been frustrated. The determination of whether there has been frustration of employment is made on a case-by-case basis. The case law on frustration establishes that employment will be considered frustrated where the employee's disability can be considered "permanent" as opposed to "temporary" in nature.

The test for distinguishing whether an illness is temporary or permanent is set out in the decision of *Marshall v. Harland & Wolff Ltd*¹ which confirmed that the issue of frustration depends on the relationship of the term of the incapacity to the duration of the employment contract:

"In the context of incapacity due to sickness, the question of whether or not the relationship has come to an end by frustration sounds more difficult than it is. The tribunal must ask itself: was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment?"

The Court listed the following factors to consider when determining whether or not the

¹[1972 2 All. E.R. 715

employment relationship has come to an end by frustration. The Court held:

“In the context of incapacity due to sickness, the question of whether or not the relationship has come to an end by frustration sounds more difficult than it is. The tribunal must ask itself: was the employee’s incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment? In considering the answer to this question, the tribunal should take account of:

(a) ***The terms of the contract, including the provisions as to sickness pay*** - the whole basis of weekly employment may be destroyed more quickly than that of monthly employment and that in turn more quickly than annual employment. When the contract provides for sick pay, it is plain that the contract cannot be frustrated so long as the employee returns to work, or appears likely to return to work, within the period during which such sick pay is payable. But the converse is not necessarily true, for the right to sick pay may expire before the incapacity has gone on, or appears likely to go on, for so long as to make a return to work impossible to radically different from the obligations undertaken under the contract of employment.

(b) ***How long the employment was likely to last in the absence of sickness*** - The relationship is less likely to survive if the employment was inherently temporary in its nature or for the duration of a particular job, than if it was expected to be long term or even life long.

(c) ***The nature of the employment*** - Where the employee is one of many of the same category, the relationship is more likely to survive the period of incapacity than if he occupies a key post which must be filled and filled on a permanent basis if his absence is prolonged.

(d) ***The nature of the illness or injury and how long it has already continued and the prospects of recovery*** – The greater the degree of incapacity and the longer the period over which it has persisted and is likely to persist, the more likely it is that the relationship has been destroyed.

(e) ***The period of past employment*** - A relationship which is of long standing is not so easily destroyed as one which has but a short history. This is good sense and, we think, no less good law, even if it involves some implied and scarcely detectable change in the contract of employment year by year as the duration of the relationship

lengthens. The legal basis is that over a long period of service the parties must be assumed to have contemplated a longer period of sickness than over a shorter period.

These factors are interrelated and cumulative, but are not necessarily exhaustive of those factors which will be taken into account in the determination of frustration of contract.

The test in *Marshall* has been adopted in Canada. In the case of *Antonacci v. Great Atlantic & Pacific Co. of Canada*², the Court found that the employee of 33 years was wrongfully dismissed during a short vacation leave taken to recuperate from a back injury. The Court found that it was not appropriate to make a finding of frustration in this case as the “contract of employment contemplated a lengthy period of absence by an employee, especially one with long service and who was injured on the job.”

In *Yeager*³ v. *R.J. Hastings Agencies Ltd.*, the British Columbia Supreme Court dealt with a situation wherein the employee had worked for the employer for a period of 40 years prior to his termination. The employee had worked up to the position of second in command and was a significant shareholder in the corporation. Over the last three years of his employment, the employee’s illness became progressively worse until he was found to be occupationally disabled. The Court held that a two year period of disability could not be regarded as permanent and in coming to its findings the Court relied upon the *Marshall* test.

Frustration of employment due to disability has been found in the following situations:

In *MacLellan v. H.B. Contracting Limited*⁴, the Court upheld the termination of an employee with fifteen years service after the employee suffered an ankle injury which was determined to be a

² (1998), 35 C.C.E.L. (2d) 1, reversed on other grounds (Jan 12, 2000), Doc. CA C29388 (Ont. C.A.).

³(1985), 5 C.C.E.L. 266 (B.C.C.A.)

⁴(1990), 32 CCEL 103 (B.C.S.C.)

permanent disability. The employee had been unable to work due to his disability for four years. The finding of frustration of contract was made despite the fact that the employer initially dismissed the employee on six months' notice due to financial difficulties. It was later determined that the employee's injury was a permanent one.

*In Re Ontario English Catholic Teachers' Association and Office and Professional Employees' International Union*⁵, the Arbitrator upheld the termination of an employee who due to a back injury was unable to perform "a number of the core functions" of her job, although she remained capable of "performing many of the functions" in her position.

The characterization of an illness as "permanent" for purposes of frustration of the employment relationship does not necessarily mean that the illness itself is "permanent." Although an ill employee may expect to recover from his or her illness at a certain time in the future, there still may be a finding that the employment contract was frustrated as a result of the illness.

Given that no decision has been made which clearly defines what is entailed in an employer's duty to accommodate a disabled employee, or has provided a check-list of the components of undue hardship, the employer's decision to terminate an employee with a chronic illness will necessarily require the employer to be prepared to answer a complaint of having discriminated against the employee because of handicap. While employers will not be required to create a newly-funded position, or implement substantial and permanent reassignments of their entire workforce, employers will be expected to incur some hardship and financial costs to ensure that the disabled employee is given opportunities to become and remain gainfully employed.

⁵(1996) 61 LAC (4th) 109

A further caution is noted regarding the termination of employees who are in receipt of disability benefits. Typically, an employee is entitled to receive long-term disability benefits after exhaustion of her short-term disability benefits provided the employee is disabled from performing the essential duties of her position. To continue to receive long-term disability benefits, after a specified period of time, generally 24 months, the employee must be disabled from performing any work. An employer may want to review the employment relationship at this time -- if the employee has been absent from work for more than two years, it is likely that the employee will not return to work. The written attendance policy should deal with contingencies such as the continuation of group benefits, including drug plans, vision care, dental coverage, and extended medical care in situations where there has been an extended absence. Some employers provide these types of benefits to employees who are receiving disability benefits. Others reduce their liability by establishing limitations on group benefit coverage as part of the benefits plan. Depending upon other circumstances, a good benchmark to review the provision of group benefits may be after two years of absence. The *Workplace Safety and Insurance Act* requires health benefit coverage to continue for the first 12 months of an employee's disability.⁶ Some employers insure the group benefit plan premiums as part of the long-term disability coverage.

⁶Section 25(1)

(b) The Frequent Absence

The key to understanding whether a human rights challenge would succeed in situations of employee dismissals or placing employees on attendance control programs because of chronic absenteeism, is the cause of the absenteeism. An employer cannot dismiss an employee without providing notice because the individual is or has been disabled short of a finding of frustration of contract. For example, if the absences or the pattern of absences have resulted from a heart condition, cancer, or mental illness as depression, then, dismissal or discipline for such absenteeism may be found to be discrimination based on handicap and a violation of the Code. Absences which have resulted from a variety of causes including sleeping in⁷, the flu, a cold, upset stomach, or other passing conditions have not resulted from a “disability” or “handicap” as defined by the Code and accordingly, a termination based upon such absences would probably not be considered a violation of the Code. This area must be treaded upon with extreme caution.

⁷Note: if the sleeping in is as a result of regular attendance at a bar the night before, you may have a ‘handicapped employee’ as he may have a drug or alcoholism problem which has been defined as a handicap under the Code.

As note in Part 1 of this Paper, handicap has been defined as something different from a transitory sickness. Handicap is something that affects an individual in carrying out life's important functions. In the case of *Ouimette v. Lily Cups Ltd.*⁸, the Board of Inquiry held that in order for a condition to be considered a disability, it had to meet the following conditions:

1. it had to affect a defined group;
2. it had to be more than transitory, placing or being perceived to place substantial ongoing limitations on one's activities; and
3. it had to affect or be perceived to affect an individual in carrying out life's important functions.

An employer has an obligation to make inquiries to discover whether its employee is disabled especially if the employee is exhibiting symptoms which seem to indicate that she has a disability which requires accommodation. In the case of *Willems-Wilson v. Albright Drycleaners*⁹, the British Columbia Human Right Tribunal held that while the employee never directly informed her employer that she suffered from a depression disorder, the employer was aware that she was frequently found crying and upset at work. The employer was therefore held to have discriminated against the employee when it terminated her employment after she had been hospitalized because of her emotional difficulties.

⁸90 CLLC 17,019.

⁹ 98 C.L.L.C. 230-007

In circumstances where an employer terminates an employee due to excessive absenteeism, there can be a finding of “indirect” discrimination based upon the employee’s disability. In *Re: Ontario Human Rights Commission v. Gaines Pet Foods Corp.*¹⁰, the Ontario Divisional Court held that the employer had the right to terminate an employee for absenteeism as long as the absenteeism was **unrelated** to any disability or handicap. In this case, 25% of the total number of days missed over the entirety of this employee’s employment were absences due to cancer. Because those absences were considered by the employer in its decision to terminate the employee’s employment, the termination was found to be discriminatory.

In order to justify termination for excessive absenteeism, an employer must establish that the employee has had excessive absenteeism in the past and, the employee is incapable of regular attendance in the foreseeable future.¹¹ Moreover, the employee’s absenteeism can not be accommodated without undue hardship to the employer. To make such a determination, the factors set out above regarding the accommodation of employees must be considered.

If the employer is unable to accommodate the employee’s absences without undue hardship, and the above two factors can be established, the employer may be entitled to terminate the employee for innocent absenteeism.

The termination of employees for innocent absenteeism was upheld in the following cases:

- The employee had long and extensive history of absenteeism for over nine and a half years which far exceeding the company’s average rate. The employer brought the excessive absenteeism to the employee’s attention and gave the employee

¹⁰(1993), 16 O.R. (3d) 290

counselling and opportunities to improve the situation, without avail. As it was found that employee was incapable of regular attendance in the future, the termination was upheld.¹²

¹²*Re Pasteur Meriteux Connaught Canada and Communications, Energy and Paperworkers Union of Canada, Local 1701* (1998) 75 LAC (4th) 235

An employee suffered from degenerative disc disease which caused her to be absent for almost four years. Based upon information provided by the employee and her physician, the employer reasonably concluded that the employee would not be able to return to any form of gainful employment and terminated her employment. Of note was the finding that there was no evidence to suggest the employee would be capable of returning to work on a part-time basis at any material time.¹³

If the contract is found to be frustrated, then there is no need to provide reasonable notice or pay in lieu of notice. If, on the other hand, frustration of the contract is not established, an employer must provide reasonable notice or pay in lieu of notice to a sick or disabled employee whose employment is terminated.

1. **The “Stressed out Worker” Absence**

A common scenario which presents an employer is an employee, who has been a marginal performer and whose supervisor or manager has started to demand higher performance. This demand for higher performance has resulted in episodes of absenteeism. Sometime, when the employer tries to address the performance or even a poor attitude issue, the employee will thereafter call in ‘sick’. Employers must be cautious in these situations. In some cases the demand for better performance is a legitimate causative factor. In some cases the employee plays the disability card and in others the absenteeism is entirely legitimate and unrelated to the performance or attitude problems. The key in dealing with these types of scenarios is to know the cause of the absenteeism and to react accordingly.

¹³Re *Oxford County Board of Health and C.U.P.E.* (1999) 81 LAC (4th) 268

Dealing with employee absenteeism requires special care by employers. Be vigilant from the outset and consistent with your absenteeism policies and always contact an employment lawyer to help you navigate this minefield.