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Ask an Expert

with **Natasha Zervoudakis**

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TORONTO

Waiting for medical documentation of absences

Question: If the employer is aware an employee's absence is due to a medical condition but the employee doesn't respond to requests to provide medical documentation supporting the absence or return date, how long must the employer wait?

Have a question for our experts? Email **Jeffrey.R.Smith@thomsonreuters.com**

Answer: The short answer is — it depends. Generally speaking, there is no bright-line rule setting out how long an employer must wait to receive medical information before issuing discipline for an unsubstantiated absence. The analysis is contextual.

For example, in a unionized work environment, a collective agreement may mandate the length of time an employer must wait before issuing discipline, as well as the types of discipline the employer can issue.

Federally regulated employers should be aware the Canada Labour Code places restrictions on discipline when an employee is absent from work due to work-related or non-work-related illness or injury.

One thing is clear: the road to termination on the basis of an unsubstantiated absence can be a long one. In *Calgary Co-operative Assn. v. U.C.C.E.*, an employee was dismissed for failing to provide medical documentation to substantiate an ongoing absence. The arbitrator determined the employer had just cause to issue some form of discipline on the basis of the following factors:

- The absence extended beyond the date supported by medical documentation.
- Multiple requests were made for additional information.
- A clear warning was issued that failure to provide updated information would result in discipline.
- No reason, medical or otherwise, precluded the provision of the information or a return to work.

In determining the penalty of discharge was appropriate, the arbitrator found the employee's discipline-free, long service and legitimate illness, were outweighed by aggravating factors, in particular, the deliberate withholding of medical information by the employee and the union.

An employer should also ensure it can establish disability was not a factor in the decision to discipline and the employer has not breached its duty to accommodate. In *Baber v. York Region District School Board*, the employee, absent from work due to illness, alleged that in terminating her employment the school board discriminated against her by failing to accommodate her disability-related needs. The employee had been absent for months and, despite multiple requests and a warning that failure to participate could result in termination, failed to provide adequate medical information to substantiate her absence or support accommodation. The Human Rights Tribunal of Ontario found the duty to accommodate did not permit the employee to refuse the employer's legitimate requests for information, nor did it require the employer to tolerate an ongoing unsubstantiated absence. The application was dismissed.

> Employers don't have the right to request a diagnosis, but deserve information indicating the employee's ability to work or expected return to work.

To help employers navigate these often murky waters, consider these best practices:

Make multiple written requests for medical information. This is key to demonstrating the employer is appropriately managing absenteeism and the accommodation process.

Try to confirm the employee's receipt of the request for information. If a request is being made via e-mail, request a read receipt and keep records.

Specify a deadline for delivery of the requested information, but ensure the time period is reasonable.

Clearly communicate the type of medical information required. For example, indicate that a note from a physician stating the employee is "unfit for work" but providing no further information will be insufficient. Be sure not to request a diagnosis, as this is not permissible for an employer to seek.

Provide the employee with a letter for his physician containing specific questions with regard to medical restrictions, the possibility of modified duties, and the expected return-to-work date. If possible, enclose the employee's job description. Providing an overview of an employee's daily responsibilities may assist the physician to determine medical restrictions and evaluate the potential for return to work.

Ensure in each request for medical information, the employee is advised that he has a legal obligation to participate in the accommodation process. If an employee fails to respond, ensure follow up requests make clear that failure to provide information could result in discipline up to and including termination. This is particularly important, as decision-makers will typically inquire whether the employee knew he would be disciplined for failing to provide the medical information.

For more information see:

- *Calgary Co-operative Assn. v. U.C.C.E.*, 2012 CarswellAlta 941 (Alta. Arb.).
- *Baber v. York Region District School Board*, 2011 HRTO 213 (Ont. Human Rights Trib.).

He said, she said

Question: Should an employer issue discipline if it is aware of misconduct but has no actual evidence other than hearsay that isn't any more reliable than the suspected employee's denials?

Answer: Whenever there is an allegation of misconduct, an employer should conduct an investigation before making the decision to discipline. Issuing discipline without reliable evidence is risky and not recommended.

For the results of the investigation to be reliable and, if challenged, defensible, it must be performed by someone with training or experience performing investigations, and the investigator cannot be, or be seen to be, biased.

Dismissal of an employee based on a faulty investigation could leave the employer open to significant liability beyond wrongful dismissal damages. In *Elgert v. Home Hardware Stores Ltd.*, the employer dismissed a 17-year employee after conducting an investigation into allegations of sexual harassment. A jury found the employee was wrongfully dismissed and, in addition to awarding 24 months' notice, awarded $60,000 for defamation, $200,000 in aggravated damages and $300,000 for punitive damages. On appeal, the Alberta Court of Appeal set aside the aggravated damages but found punitive damages to be justified in light of the employer's actions, including a sub-standard investigation. The court's concerns included: the employer's failure to remain neutral, the appointment of an inexperienced investigator, the fact the employer had predetermined it would terminate, and the employer's overall treatment of the employee during the investigative process (which the court described as "high-handed and vindictive"). Ultimately, the court reduced punitive damages to $75,000, an amount it believed appropriately punished the employer.

What level of proof is necessary to justify termination? While it is always preferable to have absolute proof, that is not always possible. The good news for employers is absolute proof is not the standard. Except in the case of alleged criminal misconduct (where the standard is "beyond a reasonable doubt"), the standard of proof in civil courts and arbitrations is "the balance of probabilities." In other words, is it more likely than not the alleged events occurred.

Where evidence is lacking, and the employer must assess the credibility of the witnesses to determine which are telling the truth, the employer should be able to justify its assessment. For instance, the complainant's version of events may be consistent with timekeeping records, while the accused employee's is not. Or the accused employee's account may be consistent throughout, whereas the complainant's account varied considerably.

Bottom line: Issuing discipline in the absence of evidence is risky and not recommended. Instead, the employer should undertake an investigation to inquire into what happened. When in doubt ask yourself two questions: 1) Would discipline hold up to the scrutiny of a judge or arbitrator? 2) If not, what are the possible ramifications of an unfavourable decision financially and in the workplace generally? See *Elgert v. Home Hardware Stores Ltd.*, 2011 CarswellAlta 1263 (Alta. C.A.).

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