Employment law

Ontario worker's innocent absenteeism just cause for dismissal

'The employer met its onus to make reasonable inquiries into the accommodation process'

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An Ontario hospital was entitled to fire a worker after years of excessive innocent absenteeism, an arbitrator has found.

The case serves as an example of how a properly structured and well-documented attendance management program can help an employer deal with excessive absenteeism, says Sundeep Gokhale, a labour and employment lawyer with Sherrard Kuzz in Toronto.

“The employer in this case displayed patience and commitment to the [attendance management process], appropriately applying its attendance management policy to the facts at hand,” says Gokhale. “The employer kept thorough and accurate records of the process, creating a strong evidentiary record it had met its legal obligations to the [worker].

The worker was a nurse for St. Joseph's Health Care, a hospital in Toronto. Hired in 2004, she continued in her position when St. Joseph's became part of Unity Health in August 2017.

Read more: An Ontario hospital's attendance management program needed to address disability-related absences.

St. Joseph's introduced an attendance support program (ASP) that required satisfactory attendance – fewer than five shifts or four incidents of absence in a six-month period. An incident was defined as "an absence for one or more consecutive days resulting from the same illness."

The program involved an initial review followed by a progression through five steps, with the fifth step being termination of employment. An employee would be removed from the ASP after two consecutive six-month periods below the satisfactory threshold.

The worker entered the ASP with an initial review letter in October 2012, as she had accumulated 11 sick days over five incidents in the previous six months. She advanced through four steps with six-month sick-day totals ranging from five to 30. At each stage, the hospital warned that her attendance needed to improve or her employment would be in jeopardy.

Regular warnings to improve attendance

The warning at each step of the program was key if an employee reached the end stage of the ASP involving termination, says Gokhale.

"It was imperative for the employer to not only issue warnings along the way but to outline what the next absence would lead to – in this case, that the absences were excessive and the [worker's] employment was in jeopardy," he says. "Warnings serve an important purpose, giving the employee a reasonable opportunity to improve their performance."

After receiving the step four final notice in February 2015, the worker's absences dropped to below the threshold over the next two six-month periods. She was removed from the ASP in July 2016.

However, the worker's absenteeism soon increased, as she missed 17 workdays between May and September 2016 due to complications from her pregnancy. She went on maternity leave in September, but she received a step one warning under the ASP when she returned. Her attendance continued to suffer with absences due to bronchitis, pneumonia, a fractured ankle, and back pain. The worker advanced to step three and, after one six-month period below the threshold, her absences increased to 22 days over late 2018 and early 2019, putting her on the fourth step and a final notice.

From April to September 2019, the worker was absent for 19 days and five incidents, so the hospital terminated her employment under step five of the ASP.

The union grieved, arguing that some of the illnesses should be excluded from the worker's attendance record. It pointed to the collective agreement's attendance management clause, which stated that absences "arising out of a medically established serious chronic condition," among others, would not be counted for progression through the ASP. The clause also stated that it would be interpreted consistent with the Ontario Human Rights Code.

The union said that the 17 days of absence in 2016 due to the worker's pregnancy should not have counted. This would have dropped her below the threshold and she wouldn't have been placed back on the ASP at that time.

Absences impacted hospital, patients

The arbitrator found that the attendance management clause defined "medical substantiated exclusions" and none of them applied to any of the worker's absences, including pregnancy. In addition, the worker didn't request accommodation at any point, even though each step of the ASP involved a discussion and review of her attendance. She also didn't grieve or complain about the inclusion of her pregnancy-related absences when they put her back in the ASP, said the arbitrator.

The attendance management programs serves as a way for employers to determine whether the employment relationship is likely coming to an end due to persistent, high absenteeism. The worker's frequent absences had a significant impact on the hospital's ability to serve patients and the worker was warned at each stage of the ASP that she was required to improve her attendance or face termination, said the arbitrator.

Read more: An attendance management program that included sick leave and family-related leave to enter employees into the program was discriminatory.

Gokhale notes that sometimes employers have a legal obligation to inquire if there may be a disability requiring accommodation if the employee doesn't raise one, but in this case the hospital covered its bases.

"In my experience, the employer met its onus to make reasonable inquiries into the accommodation process," says Gokhale. "The employer repeatedly warned the [worker] about the consequences of her poor attendance, but also specifically asked [her] at every opportunity whether she needed some form of accommodation, adjustment to her work, or assistance and support."

The arbitrator added that the union didn't challenge the fairness of the ASP itself, so there was a presumption that if an employee reached the end stage of the ASP, the point of undue hardship was reached.

The arbitrator found that that the worker was unable to maintain regular attendance – she was on the ASP for nearly eight years in total, minus a couple of short intervals, out of her 16 years with the hospital. In the absence of any disability or accommodation request, it was reasonable for the hospital to assume that the worker could not achieve acceptable attendance levels. The grievance was dismissed.

Generally, there is no legally set threshold for terminating an employee for innocent absenteeism, but it's likely such absenteeism can be just cause if the employer can prove that the employee's attendance record constitutes undue absenteeism and the employee is incapable of regular attendance in the future, according to Gokhale.

"As the arbitrator noted in this case, an employer is entitled to set an attendance standard for its workplace, so long as the standard meets at least two conditions – first, it must be reasonable, and second, the employer must meet its human rights obligations in each individual case," he says. "An employer is required to make an individualized assessment to determine whether the excessive absenteeism is related to a disability which must be accommodated to the point of undue hardship."

See Un*ity Health and ONA (YY), Re*, 2022 CarswellOnt 2397.