

Attendance Management: A Worst Case Scenario



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Attendance Management, or workplace management of absenteeism, has become a hot-button topic over the last few years for many unions, including MAHCP. Employers who are trying to minimize workplace absences have tried to create a system to control these absences, but the application of the AMP can be varied. There can be uneven application of rules, misunderstandings around culpable and innocent absences, and sometimes a lack of understanding of Human Rights legislation and how this impacts accommodation. This article is a first in a series where we take a closer look at Attendance Management.

THE FACTS OF THE CASE

Shirley* (not her real name) was an experienced nurse of approximately 23 years, but she had a long history of being on the Attendance Management Program (AMP). After a number of years of being on the program, Shirley's employer decided to terminate her employment. At no time did the employer challenge her competence or quality of work; she was fired on the basis that there was a "frustration of the employment contract." Her union challenged the termination and an arbitration hearing date was set.

Shirley worked on a children's ward, where she came into contact with infants. She felt it was important to attend work in good health and not expose her patients to infectious diseases, so she accumulated a number of absences over the course of 8 years.

She said that over the years she had experienced various gastrointestinal 'bugs' and respiratory illnesses and, "as I got longer in the profession, my immune system was not as good, and I got sick

every month or every two months".

To try to counteract the periodic sickness Shirley experienced, she consulted a specialist in immunology and allergies. The specialist was not able to provide evidence to support immune deficiencies. He stated, "I am sure there are no clear features of a secondary immunodeficiency but rather I think just the chronic fatigue and the cycle of returning to work too early where other co-workers are also sick in combination with exposure to children and their families is exacerbating the situation." Another physician was also unable to determine evidence of immune deficiency.

During the various stages of AMP, Shirley later said, on many occasions, there would be no meetings for six to nine months, beyond even the time period under discussion. She also stated that she was never offered any accommodation by the Hospital. When asked whether she had ever thought of applying to another area of the Hospital, she said she hadn't because she loved her job and what she was doing.

Shirley admitted, "Sometimes when I had recurring illnesses, I wasn't quite up to snuff when I came back." However, she felt that she had had long enough time now without getting sick, so there would be a change if she returned to work.

A SNAPSHOT OF SHIRLEY'S WORK ABSENCES

April 2004-March 2005	67.5 sick hours (3% absenteeism)
April 2006-March 2007	281.25 sick hours (14% absenteeism)
April 2007-March 2008	303.75 sick hours (16% absenteeism)
April 2008-March 2009	146.24 sick hours (8% absenteeism)
April 2009-March 2010	90.0 sick hours (5% absenteeism)
April 2010-March 2011	258.75 sick hours (13% absenteeism)
April 2011-February 26, 2012	168.75 sick hours (9% absenteeism)

Shirley's absences varied from 3% per year to 16%. As a result, she was at stage 6 (the final stage) of the AMP for the last four

years prior to her termination.

At her arbitration, Shirley acknowledged that:

- she was aware of the details of the AMP;
- she was aware of the criteria that were applied to everyone;

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- the Employer had offered her assistance on numerous occasions;
- she had been advised of the Employer employee assistance program;
- she had been asked if she had any disability that required accommodation;
- she was aware that a consequence of reaching stage 6 of the AMP might be termination for non-culpable absenteeism;
- she had received numerous warnings of same;
- she had been at stage 6 for more than four years prior to her termination;
- there was no underlying medical condition of which she was aware that prevented her regular attendance at work;
- the employer's record of her absences was correct;
- no grievances had ever been filed about her location in the AMP or the criteria that were being applied;
- she had had union representation concerning her attendance for years;
- she could not think of anything else that the employer could have done to assist her.

During the course of her employment and as part of the process employed, her employer asked her to repeatedly to meet with her healthcare providers to consider options to improve her attendance. The employer posed certain questions to Shirley's physician:

- In your opinion, is there an expectation that the employee's condition(s) will improve?
- Can the employer expect the employee's work attendance to improve?
- Is there a treatment plan in place for this employee?
- Is there anything that the employer can do to assist this employee with their work attendance?
- Does the employee have a medical condition(s) that would prevent her from attending work on a regular and consistent basis?

Her physician answered "No" to the first 4 questions and added "No chronic medical issues, recurrent episodic illness" in answer to the last question.

In Shirley's defense, the union provided evidence that it was not involved in establishing the standards for acceptable levels of absenteeism, and that this was at the employer's discretion under the contract. However, the standards had to be fair and reasonable in the circumstances.

The union argued the employer had to establish that the attendance standard was fair and it had to demonstrate "that the absence of an employee is excessive both on an absolute and a comparative basis. The employer also had "to show that the record of absenteeism is so extreme as to have fundamentally and irreparably breached the employment relationship."

The union focused its argument on Shirley's long service record and that the employer had never challenged the validity of her absences. The union also stated that the employer had not provided Shirley alternate employment.

THE RESULTS

The arbitrator outlined that the employer had to establish there was: "(a) undue absenteeism in the grievor's past record, and, (b) that the grievor is incapable of regular attendance into the future," in order uphold its termination based on frustration of the employment contract.

The arbitrator had no difficulty finding on the facts that there was "undue absenteeism" in Shirley's case. When evaluating whether she was incapable of regular attendance in the future, the arbitrator indicated that that Shirley's stated good hopes and intentions was not enough. The arbitrator needed medical evidence to establish that ability and that was not available in this case. The arbitrator dismissed the grievance and upheld the termination because, as he said, "if reinstated she would be highly unlikely to be able to attend at work on a regular basis in the future."

This is an exceptional case because it resulted in a termination. Usually employees are on AMP for a while and then they either alter their attendance or are diagnosed with a medical issue that is causing the attendance problems. In this case, Shirley was not able to get the appropriate medical confirmation that she needed in order to be accommodated and that resulted in the termination.

This case occurred in Ontario (the law is virtually identical in Manitoba). This study is based on a termination grievance that was ultimately argued before an arbitrator and dismissed.

Case Study: Sault Area Hospital v Ontario Nurses Association (2014) (Arbitrator James Hayes) The full case can be found at: 2014 CanLII 19334 (ON LA), <http://canlii.ca/t/g6lths>.