ABSENTEEISM AND THE DUTY TO ACCOMMODATE: THE EMPLOYER’S RIGHTS AND OBLIGATIONS

David L. Rice
Nicholas W. Peterson

Miller Thomson LLP
Barristers & Solicitors
1000 – 840 Howe Street
Vancouver, BC V6Z 2M1
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1. THE EMPLOYER’S ROLE IN REDUCING ABSENTEEISM

Absenteeism Generally

Absenteeism is defined in the Canadian Oxford Dictionary as “the practice of absenting oneself from work or school etc., especially frequently or illicitly”. This paper will discuss when a series of absences amounts to absenteeism and what, if any, responses the employer can lawfully make.

Absenteeism poses an enormous financial and social cost on the employer and on employees.

The effect of absenteeism in the workplace is far reaching, in terms of reduced morale and increased costs.

The employer’s ability to function efficiently and cost effectively is reduced by absences of any kind, and especially by those that are unpredictable, even if of a short duration. The employer’s increased costs result from:

(a) increased employee training;
(b) increased overtime;
(c) operational inefficiencies caused by substitute employees performing unfamiliar jobs;
(d) safety issues arising from substitute employees performing unfamiliar jobs;
(e) reduced customer satisfaction due to increased employee turnover;
(f) increased management and administrative time in managing the absence;
(g) reduced “production”;
(h) delayed production and/or missed deadlines; and
(i) increased costs for indemnity plans and sick leave policies that provide compensation for the absent employee.
The decrease in employee morale is another serious and negative consequence of absenteeism. With occasional exceptions, an employee does not miss work willingly nor happily. Additionally, he/she often suffers some degree of wage loss.

Fellow employees also suffer. They may be called upon to perform additional, new and unfamiliar functions, work overtime or increase their production, all in an attempt to mitigate against the consequences of the absence of a fellow employee.

**Strategies to Reduce Absenteeism**

Given that absences and absenteeism have the above described negative effects, it is clearly in the employer’s interest to endeavour to minimize absences and address poor attendance or “problem attendance” employees.

An initial strategy in addressing an employee’s decision to stay away from the workplace is to make the workplace (to the extent possible) a place to which the employee is attracted. The “best employer” lists examine many aspects of the workplace. All of these are within the control of the employer and are worthy of review by an employer anxious to increase attendance.

One such “best employer” list used eight criteria for its national competition:

(a) physical workplace;
(b) work and social atmosphere;
(c) health, financial and family benefits;
(d) vacation time and time off;
(e) employee communication;
(f) performance management;
(g) training and skills development; and
(h) community involvement.

Other factors that are valued by employees include:

(a) comfortable, well-lit, and healthy surroundings;
(b) comfortable, ergonomic, and safe tools, equipment, and furniture;
(c) flexible hours;
(d) working from home flexibility;
(e) daycare facilities; and
(f) recreation and leisure facilities (library, gymnasium, showers, pool tables, etc.).

Often the presence of just one of these features will cause the employee to avoid missing work or to reduce the length of his/her absence. Clearly, there are many reasons for an employee’s absence that are beyond his/her control no matter how anxious the employee may be to return to work. But where there is some capability for the employees to control his/her attendance at work, the presence or absence of one or more of the above features may be significant.

Other strategies available to the employer are:

(a) attendance management programs;
(b) workplace wellness initiatives;
(c) employee satisfaction surveys;
(d) incentives to employees for unused sick days and meeting attendance targets;
(e) improve employee morale by reducing stress, rumours, negativity and gossip;
(f) reduce employee stress by improving the relationship with their manager. Highly authoritarian manager are likely to cause an increase in absenteeism;

(g) poor employee relationships with the manager should be assessed and management training considered;

(h) the solution to rumours, negativity and gossip that reduces morale and increases absenteeism is team building;

(i) work-life conflict recognition;

(j) avoid discipline for legitimate absences such as illnesses when employees have depleted their regularly scheduled leave;

(k) allow employees to carry over unused sick days; and

(l) allow employees to telecommute.

**Work-life Conflict Recognition**

It is said that reducing the work/life conflict will tend to increase attendance. “Work/life conflict” refers to the negative interference an employee experiences when demands associated with one role in his/her life affects performance in the other. The roles in an individual’s life include: employee, manager, spouse, parent, child, sibling, friend and community member.

Each of these impose demands on the individual which require time and energy. Stress results when the demands of these roles are such that participation (“successful” or “committed” versus “token” participation) in one role is made more difficult or impossible by the demands of another. It is this work/life conflict that contributes to stress and/or pushes an employee to absent himself from the workplace in order to deal with this stress or to meet demands or fulfill the roles that are not being fulfilled.
Employers are recommended, to proactively respond to such concerns, to:

(a) reduce employee workloads or otherwise make the workloads more manageable;
(b) examine unrealistic work demands;
(c) reduce job related travel;
(d) hire people in proportion to the job area demands;
(e) change the job accountability framework and employee reward structure;
(f) develop more reasonable procedures and expectations surrounding office technologies;
(g) clarify when and where an employee will be working;
(h) focus on objectives, results and outputs, and less on hours worked;
(i) allow employees to refuse overtime work without actual or perceived adverse consequences on the employee’s career;
(j) provide a limited number of days of paid leave per year for child care, elder care or personal problems;
(k) enable employees to transfer from full-time to part-time work and vice versa;
(l) work with employees to identify effective policies; and
(m) offer child and elder care referral services.


**Financial Benefits**

One human resources advisor has noted the following financial benefits of implementing an attendance management program and other workplace wellness initiatives (Cornelia Bujara, *Attendance Management Program Proactive Solution to Absenteeism*, HRVoice.org, Issue:10 Vol:4, Mar 06, 2008):
For every dollar spent on a corporate wellness program, cost savings of between $2.30 and $10.10 have been experienced in the areas of decreased absenteeism, fewer sick days, reduced WCB claims, lowered health and insurance costs, and improvements in employee performance and productivity.

Coca Cola reports saving $500 per employee per year after implementing a fitness program.

Coors Brewing Co. reported that each dollar spent on its corporate wellness program, lead to a $5.50 return and an 18 per cent reduction in the absenteeism rate.
2. ATTENDANCE MANAGEMENT PROGRAMS: DESCRIPTION AND IMPLEMENTATION

Attendance Management Programs

In this section, the implementation and operation of one of the most commonly used strategies to address absenteeism - an Attendance Management Program or “AMP” - will be described.

The other strategies or responses utilized by employers to reduce absenteeism (described in Section 1) do not contain an element that adversely affects an employee (or may do so) as does the AMP. This potentially prejudicial element (e.g. discipline or even dismissal for absences above “the standard”) is seen by employers as necessary to create an effective AMP that reduces absenteeism.

The unwanted restrictions under the policy can include compulsory attendance at an absenteeism focused interview, receipt of a warning letter regarding the employee’s attendance, advancement of the employee to a different, more onerous stage of the policy, compulsory participation in counselling and ultimately, disciplinary responses, including termination.

However, this adverse component is also the feature that leads to challenges from employees and their representatives. As a result, certain AMP’s have been closely scrutinized to ensure that the procedures contained in them comply with the employer’s legal obligations applicable to dealing with absent employees, particularly its duty to accommodate. These challenges occur either at the time of the introduction of the policy or thereafter when the application of the AMP’s procedures adversely affect an employee or a group of employees. Such challenges are discussed in section 4.
The Contents of an AMP

While each AMP will contain different features, certain common provisions exist:

(a) a standardized formula or methodology to set the target or objective for acceptable (and unacceptable) attendance;
(b) a quantification of “unacceptable”, “excessive” or “chronic” absenteeism (often tied to the all-employee average);
(c) a standardized, publicized and transparent methodology for recording or measuring absenteeism;
(d) a standard process for monitoring and identifying excessive or unacceptable levels of absenteeism;
(e) the mandatory participation by the employee in discussions and counselling to maintain or re-establish acceptable attendance; and
(f) the application of discipline (including termination of employment) should the employee’s participation in the AMP fail to bring attendance within the desired range.

Implementation of an AMP

A “company rule” refers to a rule, procedure, policy, program or protocol that governs the behaviour of employees and can have adverse consequences on employees who fail to comply.

The legal principles applicable to the introduction of a company rule apply to the implementation of an AMP. In particular, the introduction or implementation must first comply with the requirements set forth in *KVP Co. v. Lumber & Sawmill Workers' Union, Local 2537 (Veronneau Grievance)*, [1965] O.L.A.A. No. 2 (“KVP”). Simply stated, in order for a company rule to be valid, the application and implementation of the rule should:

(a) not be inconsistent with the collective agreement;
(b) not be unreasonable;

(c) be clear and unequivocal;

(d) be brought to the attention of the employee(s) affected before the company can act on it;

(e) be accompanied by notice that a breach of it could result in discipline including discharge (if such is the case); and

(f) have been consistently enforced by the company.

(KVP at para. 34)
3. THE LEGAL PARAMETERS OF ABSENTEEISM: 
THE EMPLOYER’S RIGHT TO DISMISS AND THE DUTY TO 
ACCOMMODATE

At What Point Does Absenteeism Warrant Discipline or Dismissal?

Absenteeism that warrants discipline or dismissal is often described as “chronic”. The Canadian Oxford Dictionary defines “chronic” as “persisting for a long time …”. There is no doubt that many instances of chronic absenteeism do justify discipline and ultimately dismissal. A better adjective for the frequency of absences for which discipline/dismissal is an appropriate response is “excessive”.

The point at which the number of absences constitutes “excessive” absenteeism will vary with each case and with a variety of factors:

(a) the duration of the absence or absences;
(b) the reason for or cause of the absence or absences;
(c) the likelihood of the absence or the absences continuing and their anticipated duration;
(d) the pattern or predictability of the absences;
(e) the employee’s attendance history;
(f) the extent to which the absence offends the employer’s attendance policy or similar rules; and
(g) the impact in the workplace of the absence.

Of these factors, predicting the likelihood of the absences continuing and their anticipated duration is perhaps the most difficult. The employee’s optimism as to his recovery and the employer’s scepticism should be replaced by sound and objective medical and related information in cases where the employee’s physical or mental health is the cause of the absence. An assessment of the above factors may lead to the conclusion that the absences are “excessive”. Alternatively, if the employer has an AMP in place, the AMP may
characterize the number of absences as “excessive”, “above average” or “above standard”.

Culpable v. Innocent Absenteeism

The next inquiry is an assessment of the reason for or cause of the absences.

The importance in distinguishing between culpable and non-culpable absenteeism is that the process or response utilized by the employer to endeavour to improve the employee’s attendance will vary depending on the reason.

The corrective steps utilized by the employer in cases of culpable absenteeism are unlike those used by an employer in cases of innocent absenteeism. For culpable absences, the employer imposes progressive discipline. The employee is warned that the attendance level is unsatisfactory. The employee is given an opportunity to improve his/her attendance. If attendance does not improve, the employee is disciplined with progressively more punitive forms of discipline, e.g. a verbal warning, a written warning, short suspension, long suspension and ultimately, dismissal.

If there is wrongdoing or culpability on the employee’s part in causing or permitting the absence, the employer ultimately would be entitled to terminate the employment for grounds or cause. If the employee is not attending at work regularly - without reason or justification - the employer is entitled to react by imposing discipline and, ultimately, dismissal.

Often terminations based on culpable absenteeism include assertions by the employer of fraud or dishonesty due to the receipt of sick leave or similar benefits based on the employee’s false explanation for his or her absence.
The rationale for dismissals for culpable absences is that the employee is in breach of the employment contract by misconducting himself and not attending regularly at work and/or by breaching his obligation of trustworthiness in misrepresenting the reason for his absence. Where the relationship is governed by a collective agreement, the above conduct would constitute just cause for dismissal.

In cases of culpable absenteeism the employer need only prove a relatively few such incidents in which fraud, deceit and dishonesty were involved, to warrant dismissal.

In cases where the absenteeism is not the employee’s fault, the employer’s response is to advise the employee that his/her attendance record is not satisfactory, and that an improvement is expected. Ultimately, the employee should be advised that failure to improve the attendance record will lead to dismissal. The negative impact of the absence on the employer should be described and the employee should be invited to propose some adjustment to his/her work duties for the employer’s consideration. The warning letters (there should be a series of them) should not be disciplinary and should expressly state that. The employer should invite/request medical information and should consider requesting an independent medical report describing the extent to which the employee is able to work, if at all, and what accommodation might allow him/her to return to work. Ultimately, the employment relationship can be terminated if the involuntary incapacity causes the absence from work to the point where the employment contract can be said to be “frustrated”.

The employer’s responses to employees absent from work due to innocent absenteeism should be consistent. While it is recognized that each case is unique, to the extent possible, no employee should be treated more harshly than others in a similar situation.
The question of whether or not conduct is culpable or non-culpable is said to be an “elusive” enquiry, one depending on the context of the situation in question. In *Alberta Union of Provincial Employees vs. Lethbridge Community College*, 2004 SCC 28, the usefulness of such a distinction was discussed:

44 Further, one must consider whether the distinction between culpable and non-culpable conduct is relevant in the particular context. The theory underlying culpable discharge, namely that the employer is engaged in a contractual relationship with the employee and is thus entitled to the “benefit of the bargain”, does not in my opinion differ greatly from that underlying non-culpable discharge. A failure to meet the obligations and reasonable expectations of employment whether by virtue of culpable misconduct or deficient performance of a non-culpable character equally constitutes a disruption of the employment relationship. Arbitrator Hope’s comments in *Re City of Vancouver and Vancouver Municipal and Regional Employees Union* (1983), 11 L.A.C. (3d) 121 (B.C.), at p. 140, on this point are apt:

It must be remembered that the question of whether conduct is culpable or non-culpable is an elusive question directed at drawing inferences as to an employee’s state of mind on the basis of his conduct. In the final analysis it is the conduct and not the state of mind which determines the issue of continued employment. An employee who cannot perform is no better off than an employee who will not perform, if the rights of the employer are to be respected.

In practice, employers often remain focused on the employee's culpability in relation to the absenteeism. Even in these human rights enlightened times, employers need to be reminded of their accommodation obligations if the absenteeism is caused or contributed to by a disability.

**When is Termination Justified for Non-Culpable Absenteeism?**

The doctrine of frustration of contract applies to employment contracts.

This was expressed in *Wightman Estate v. 2774046 Canada Inc.*, [2006] B.C.J. No. 2164:

It has long been a tenet of our law that a contract may be brought to an end by operation of law and the parties discharged from further performance
if, without the fault of either party, the circumstances in which it was expected to be performed have changed so radically that performance would be impossible or at least something fundamentally different than was initially contemplated. In such circumstances, the contract is said to be frustrated. (Para 1)


In *Marshall v. Harland & Wolff Ltd.*, [1972] 2 All E.R. 715 (N.I.R.C.), the Court stated that the tribunal should take account of:

(a) the terms of the contract, including the provisions as to sickness pay;
(b) how long the employment was likely to last in the absence of sickness;
(c) the nature of the employment;
(d) the nature of the illness or injury and how long it has already continued and the prospect of recovery; and
(e) the period of past employment.

Most, if not all, illness or injuries that cause:

(a) frequent, short-term, and repetitive absences; or
(b) long-term absences; or
(c) the employee to be unable to work full-time

are disabilities for human rights purposes. The factors considered in such an assessment include the extent to which the employee is impaired, the cause of that impairment – physical or mental, and the extent to which the impairment impacts the performance of the employee’s regular job functions.

**The Duty to Accommodate**

Notwithstanding the apparent right to terminate the employment contract on the basis of frustration, an employer is bound by statute not to discriminate against an employee in
respect of employment because of the physical or mental disability of that person. This prohibition against discrimination applies to both provincially and federally regulated employers.

For employers regulated provincially in British Columbia, the *B.C. Human Rights Code* applies. Section 13 states:

**Discrimination in employment**

13(1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment because of the… physical or mental disability… of that person…

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

For federally regulated employers, the *Canadian Human Rights Act* applies. Section 3(1) prohibits discrimination on the grounds of… disability…

Under section 7, it is a discriminatory practice, directly or indirectly:

a) to refuse to employ or continue to employ any individual, or

b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination

Section 10 states that it is a discriminatory practice

a) to establish or pursue a policy or practice, or

b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive
an individual or class of individuals of any employment opportunities on a
prohibited ground of discrimination.

Section 15 creates exceptions to discriminatory conduct.

Exceptions

15. (1) It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

Accommodation of needs

(2) for any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

The Bona Fide Occupational Requirement Exception

As can be seen from section 15 of the Canadian Human Rights Act, an exception exists if the discrimination is based on a bona fide occupational requirement. The conduct which is, prima facie, discriminatory may be permitted if it was necessary to support a workplace standard or benchmark that amounts to a bona fide occupational requirement. In the case of an employee dismissed for disability caused absenteeism, the impugned conduct would be the dismissal. Because the dismissal was a result of absenteeism caused by a disability, prima facie, the dismissal is discriminatory. The onus now shifts to the employer to justify it on the basis of a workplace standard reasonably necessary to achieve legitimate work-related objectives. In the case of absenteeism, the employer would argue that regular attendance or, at the very least, attendance better than that of the dismissed employee, is a legitimate workplace standard. In order for that standard to be a bona fide occupational requirement, the employer must demonstrate that to continue to tolerate the employee’s absenteeism (i.e., permit an exception to the standard) would amount to an undue hardship.
Although certain provincial human rights statues, B.C.’s included, contain no reference to “undue hardship” the courts have held that for a standard to be a *bona fide* occupational requirement requires proof that non-compliance with the standard will result in undue hardship to the employer.

Whether or not a certain standard is a *bona fide* occupational requirement was considered by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (“Meiorin”):

[50] Whatever may have once been the benefit of the conventional analysis of discrimination claims brought under human rights legislation, the difficulties discussed show that there is much to be said for now adopting a unified approach that (1) avoids the problematic distinction between direct and adverse effect discrimination, (2) requires employers to accommodate as much as reasonably possible the characteristics of individual employees when setting the workplace standard, and (3) takes a strict approach to exemptions from the duty not to discriminate, while permitting exemptions where they are reasonably necessary to the achievement of legitimate work-related objectives.

[53] Finally, judges of this Court have not infrequently written of the need to adopt a simpler, more common-sense approach to determining when an employer may be justified in applying a standard with discriminatory effects.

[54] …three-step test for determining whether a *prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:

1. that the employer adopted the standard for a purpose rationally connected to 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 that legitimate work-related purpose; and

3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.
**Undue Hardship**

Several cases have analyzed whether or not the employer has accommodated the employee to the point of undue hardship.

In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, the Supreme Court of Canada said:

More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.

Wilson J., in *Central Alberta Dairy Pool*, at p. 521, listed factors that could be relevant to an appraisal of what amount of hardship was undue as:

... financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations.

She went on to explain at p. 521 that "[t]his list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case".

In this province, Arbitrator McPhillips’s set out a similar list in *AirBC Ltd.* (1995) 50, LAC (4th) 93 which has been cited with approval by the BC Labour Relations Board and the BC Court of Appeal.

The extent to which an employer may be required to accommodate an absent employee by creating a new position or reorganizing the workplace is of special interest to
employers dealing with an employee who is able to return to some form of work other than his/her regular duties. It also may encompass displacing another employee from his/her position. There is a trend towards imposing an obligation on an employer to accommodate an employee permanently in alternative work, including a vacant job, a created job or even to the extent of displacing another employee.¹

The Supreme Court of Canada in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 stated:

[16] The test is not whether it was impossible for the employer to accommodate the employee’s characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his/her work.

[17] Because of the individualized nature of the duty to accommodate and the variety of circumstances that may arise, rigid rules must be avoided. If a business can, without undue hardship, offer the employee a variable work schedule or lighten his/her duties – or even authorize staff transfers – to ensure the employee can do his/her work, it must do so to accommodate the employee. Thus,…

[18] Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively, or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him/her, the employer will have satisfied the test. In…

[19] The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees’ fundamental rights and the rule that employees must do their work. The employer’s duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.

[21] In the instant case, the Court of Appeal applied a compartmentalized approach that was equally inappropriate. A decision to dismiss an employee because the employee will be unable to work in the reasonably foreseeable future must necessarily be based on an assessment of the entire situation. Where, as here, the employee has been absent in the past due to illness, the employer has accommodated the employee for several years and the doctors are not optimistic regarding the possibility of improved attendance, neither the employer nor the employee may disregard the past in assessing undue hardship.

In *MacRae v. International Forest Products Ltd.*, 2005 BCHRT 462, the B.C. Human Rights Tribunal held that the obligation to pay severance pay did not constitute undue hardship. The tribunal held that the termination of Mr. MacRae’s employment was not done in good faith or for a legitimate work-related purpose. Interfor failed to satisfy both steps 2 and 3 of the *Meiorin* analysis.

**Frequent, Short-Term vs. Continuous, Long-Term Absences**

To this point of the analysis, the employer has assessed several of the factors listed earlier as being critical to the proper exercise of its right in respect of an employee excessively absent for non-culpable reasons. In particular, the employer has determined that the reason or cause of the absence(s) was due to the disability of the employee. As a result, the employer has a duty to accommodate the employee to the point of undue hardship. We have discussed the factors considered in assessing whether or not the point of undue hardship has or has not been reached.

Another one of the factors to be considered in assessing the extent of the employer’s accommodation is the pattern, predictability, and duration of the absences. Generally, there are two broad categories. The first consists of absences that are frequent, short-term, and unpredictable. The second group can be described as being long-term, continuous absences.
Arbitrators have recognized that frequent, short-term, unpredictable absences can impose a greater hardship on an employer than longer, sustained or continuous absences for which replacements can often be found. Paul Weiler, then serving as an arbitrator appointed under a collective agreement, described this phenomenon 40 years ago:

The difficult situation though – the one dealt with in all the cases referred to in the decisions cited above – is that of continuous, recurring, intermittent absenteeism. Here we do not just have a large number of days absent compiled in one or two accidents or illnesses (with perhaps 220 days lost in each). Rather, the employee is constantly missing work a few days at a time, scattered throughout the year, and eventually the totals amount up. Either the employee is very prone to disabling illness or injury or he has a very low pain threshold, so that his ailments keep him from or take him off work, though they would not an ordinary employee. [Massey-Ferguson (1970), 20 L.A.C. 370, at pp. 371-2]

Wallace/Bad Faith Damages

In addition to possibly having the employee re-instated and being assessed human rights damages, an employer must be aware of the duty of good faith it owes to its employee in the termination process as set out in the Supreme Court of Canada decision Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701.

In Keays v. Honda Canada Inc., 2008 SCC 39, Wallace damages were awarded at trial and on appeal. Keays suffered from chronic fatigue syndrome and was off work on disability benefits for a considerable period of time. Honda’s insurer deemed him fit to return to work and discontinued his benefits. Honda accommodated his disability-related absences for a period of time, but eventually became dissatisfied with the extent of the absences and the lack of particularity in the notes provided by his doctor. Keays refused Honda’s request to see an occupational medicine specialist to assess the accommodation he required without an explanation as to the purpose, methodology, and parameters of the
consultation. Keays was then dismissed for insubordination as a result of his refusal to attend the meeting with the specialist. He sued for wrongful dismissal and sought damages for Honda’s conduct in his dismissal and for discrimination and harassment. The trial judge referred to Honda’s approach as “a conspiracy to set Keays up for failure and dismissal”. In addition to his award of fifteen month’s notice, the trial judge added nine months as Wallace damages for the egregious bad faith demonstrated by Honda in the course of the dismissal. The trial judge also awarded an unprecedented $500,000 in punitive damages and additional costs.

The Ontario Court of Appeal reduced the punitive damages to $100,000 and the premium on court costs.

The Supreme Court of Canada struck down the Wallace damages, the punitive damages and the costs premium. All that remained of the trial judge’s award was his ruling that the appropriate notice for Mr. Keays was 15 months. In other words, the Supreme Court of Canada treated this as a “normal” wrongful dismissal suit with no entitlement to additional damages or awards beyond the norm.

The Court held that Wallace damages should not be an arbitrary extension of the notice period, but rather must compensate for actual damages suffered by the Plaintiff. The Court held that a breach of human rights legislation (the failure to properly accommodate) is not an independent cause of action that would result in punitive damages.

Finally, the Court held that the employer’s need to monitor absences of employees is a bona fide work requirement.
Merely because an employee is on sick leave at the time of the termination of her employment does not necessarily amount to bad faith on the part of the employer. In *Mulvihill v. Ottawa (City)*, 2008 ONCA 201, the Ontario Court of Appeal assessed the conduct of the employer in response to a claim of bad faith by the dismissed employee. The trial judge awarded the Plaintiff *Wallace* damages of 5.5 month’s salary plus benefits and $50,000. The Court allowed the appeal and disallowed the damages.

Mrs. Mulvihill had to work from home because her son had been diagnosed with an attention deficit disorder. The City accommodated this request. The Court of Appeal addressed the claim for *Wallace* damages:

[65] However, the trial judge also found that the City made a “mistake” in dismissing Ms. Mulvihill while she was on sick leave. As explained above, the legal standard against which conduct is to be measured for the purposes of *Wallace* damages is not whether an employer made a mistake but, rather, whether the employee engaged in unfair or bad faith conduct. A mistake is not conduct that can be said to be unfair or bad faith. Thus, on the finding of the trial judge, dismissal while Ms. Mulvihill was on sick leave did not constitute a basis for the award of *Wallace* damages.

[66] Nor could it, in the circumstances. The mere fact that Ms. Mulvihill was on sick leave at the time of termination does not necessarily mean the dismissal was conducted in an unfair or bad faith manner. There must be other evidence of bad faith, unfair dealing or “playing hardball”, such as cancellation of accommodation for an employee’s illness as a reprisal for the employee having made a human rights claim: see *Keays v. Honda Canada Inc.* (2006), 82 O.R.(3d) 161 (C.A.).

The Forum for the Claim Against the Employer

What is the correct forum for a failure to accommodate complaint? The employee often has, especially if represented by a union, several options including:

(a) a grievance under the collective agreement leading, in the absence of a settlement during the grievance procedure, to arbitration;

(b) a complaint to a human rights tribunal; or
(c) a wrongful dismissal suit.

The grievance under the collective agreement for dismissal without just cause can include claims for reinstatement, lost wages and restoration of seniority. In McGill University Health Center (Montreal General Hospital) v. Syndicates employes de l'Hospital general de Montreal, 2007 SCC 4, the Court considered the role of a collective agreement in determining the scope of an employer’s duty to accommodate. The collective agreement permitted automatic termination of an employee when he/she was absent from work for three years. The Court concluded that the collective agreement plays an important role in determining the scope of the employer’s duty to accommodate and that the three year period represented a reasonable accommodation. However, the length of time negotiated by the parties cannot fall below the kind of protection afforded by human rights legislation. The Court noted that the arbitrator correctly applied the duty to accommodate principles as well as the collective agreement’s automatic termination provision. The Court concluded that in all of the circumstances the employer had discharged its duty to accommodate the grievor and the dismissal was upheld.

A human rights tribunal complaint could be made to the Canadian Human Rights Tribunal for federally regulated employers and/or the B.C. Human Rights Tribunal. Such claims could include damages for injury to dignity, feelings and self respect and compensation for lost wages and benefits: Francoeur v. Capilano Golf & Country Club (No. 2), 2008 BCHRT 171.

How Has the Test Been Described?

The assessment of an employer’s duty to accommodate an absent employee invariably involves the factual determination as to the prospects of the employee returning to work.
In many cases this will involve medical evidence or some similar assessment to determine the extent to which the mental or physical disability of the employee will continue to prevent his/her return to work. If the evidence (including a medical prognosis) is such that it is probable the employee will return to work in the immediate future, it will be very difficult for the employer to argue successfully that its tolerance of the absences for a short term (until the return to work) imposes an undue hardship on it.

Courts, human rights tribunals, and labour arbitration boards have ruled on this issue. The evidentiary test is described in general as: “a reasonable prospect of improved attendance in the future”. The actual wording from some of the cases is:

“the employee will be unable to resume his or her work in the reasonably foreseeable future”²

“if an employee with such an illness remains unable to work for the reasonably foreseeable”²

“with no prospect of demonstrating an ability to return in the foreseeable future”³

“there is no reasonable prospect of improvement in the foreseeable future.”⁴

“was unable to perform any work and was unlikely to be able to do so in the foreseeable future”⁵

“permanently incapable of performing their jobs”⁶

“her future rate of headache-related absenteeism is predicted to be at a level which her employer could easily accommodate without undue hardship.”⁶

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² Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ), 2008 SCC 43.

³ Asante v. Plastcoat, 2009 HRT 299.


“are unable either to report for work on a consistent and regular basis”\(^7\)  
“(i) an employee’s record of past absences is excessive and (ii) that there is no reasonable expectation that it will improve in the future”\(^7\)  
“However, notwithstanding their excessive absenteeism, if an employee is able to return to work in the near future that employee may not be terminated.”\(^8\)  
“not capable of regular attendance at work”\(^9\)  
“test of inability to attend regularly at work is not only the past record of the employee, but also the reasonable prognosis for regular attendance in the future of the employee.”\(^9\)

In *Desormeaux v. Ottawa (City)*, 2005 FCA 311 the Federal Court of Appeal described its assessment of the employer’s duty:

[21] There is nothing in the Tribunal's decision to require employers to indefinitely maintain on their workforce employees who are permanently incapable of performing their jobs. Nor are employers required to tolerate excessive absenteeism or substandard performance. On the unusual evidence in this case, this complainant is fully capable of doing her job, when she is not suffering from one of her periodic headaches. Moreover, her future rate of headache-related absenteeism is predicted to be at a level which her employer could easily accommodate without undue hardship. The employer has therefore merely been required to reasonably accommodate her as mandated by the *Canadian Human Rights Act* and according to the legal test of undue hardship established in *Meiorin*, supra.

[22] The appeal will be allowed, the decision of the Applications Judge will be quashed, and the Tribunal's decision of January 14, 2003 will be reinstated, with costs to Ms. Desormeaux both in this Court and the Federal Court of Canada.

In *Ontario Public Service Employees Union v. Ontario (Liquor Control Board)*, 2008 CanLII 19774, the onus of proof was held to rest with the employer to introduce

\(^6\) *Desormeaux v. Ottawa (City)*, 2005 FCA 311.  
\(^7\) *Ontario Public Service Employees Union v. Ontario (Liquor Control Board)*, 2008 CanLII 19774 (ON G.S.B.).  
sufficient evidence from which it can be reasonably concluded that there is no expectation that attendance will improve in the future.

The basis on which an employee may be discharged for innocent absenteeism is explained in *Brown and Beatty, Canadian Labour Arbitration* (4th edition), at ¶7:6100:

When employers are faced with employees who, as a result of some infirmity or incapacity, are unable either to report for work on a consistent and regular basis or to perform the tasks expected of them, arbitrators have not left them without any remedy. To the contrary, in the absence of any limitations in the collective agreement, they have recognized the employer’s right to insist on the benefit of its bargain and to require the employee to render those services which the agreement anticipates she will perform in return for her remuneration. Most fundamentally, where it can be established that (i) an employee’s record of past absences is excessive and (ii) that there is no reasonable expectation that it will improve in the future then, unless the employer has waived its rights, and so long as it will not deprive those who are handicapped of their rights to sickness, disability and related benefits more than others, nor of their right not to be discriminated against that is guaranteed in both the Constitution and human rights legislation, employers can terminate their services on the grounds of innocent, non-culpable absenteeism.
4. ATTENDANCE MANAGEMENT PROGRAMS AND THE DUTY TO ACCOMMODATE

The employer’s duty to accommodate cannot be avoided merely because the dismissal of the employee was consistent with the provisions of an AMP. If the employer is following the letter of the AMP and the AMP does not provide a process for accommodating the disabled employee, it is inevitable that the employer’s response will fail to meet its duty to accommodate. For this reason, the duty to accommodate must be integrated into the AMP.

In *HEABC (Royal Jubilee Hospital) and HEU*, BCLRB 112/2002, the B.C. Labour Relations Board expressed the view that employers have a right to take active steps to manage absenteeism with an AMP.

The union challenged the hospital’s AMP, arguing that it was disciplinary and therefore unreasonable. The Board disagreed and pointed to the following aspects of the program which made it effective, reasonable, non-disciplinary and therefore valid:

(a) the policy should distinguish between a single disabling illness or injury and absences of a recurring, intermittent or unpredictable character;

(b) the policy may distinguish between culpable absences (such as sick leave abuse) and absences caused by non-culpable, genuine illness, but in any case must not treat non-culpable absences in a disciplinary way;

(c) the policy should be constructive in tone and be designed to assist employees;

(d) the policy must be consistent in application but flexible enough to permit management to tailor a response to individual circumstances;

(e) the policy must be consistent with the collective agreement, including the application of sick leave or LTD plans;

(f) the policy should expressly allow for reasonable accommodation where absences are due to disability; and
(g) the policy must allow for employees to access the grievance procedure where the employer’s actions may have ramifications for continued employment.

The extent to which an AMP complied with the employer’s duty to accommodate was considered by the B.C. Human Rights Tribunal in *CAW Local 111 v. Coast Mountain Bus Co.* 2008 B.C.H.R.T. No. 52. This case arose out of a human rights complaint brought by the CAW on behalf of certain of its members who were employed at Coast Mountain. The union alleged that Coast Mountain’s AMP discriminated against employees on the basis of their disability. The factual basis of the allegation was that Coast Mountain employees with disabilities had a higher than average absenteeism rate as a result of those disabilities.

The Tribunal analyzed the Coast Mountain AMP and described it in this fashion:

16 The AMP is, in essence, a program through which CMBC first identifies operators who have unacceptable levels of absenteeism, and then provides them with notice that it considers their attendance to be unacceptable. CMBC reviews the attendance of its employees every three months, at what are termed “quarterly meetings”. Employees identified pursuant to this process may simply be monitored, or may be progressed through a series of stages. First, employees may have informal discussions with their Supervisors about their attendance. If there is insufficient improvement, employees will be advanced to Level 1, and provided with a formal letter outlining CMBC’s concerns. If there continues to be insufficient improvement, employees are advanced to Level 2, at which CMBC may ask them to provide a medical assessment from their physician with respect to their state of health. After considering the information provided in this medical assessment, CMBC may proceed to a Level 3 interview, at which time an employee is provided with a formal letter requiring them to meet prescribed attendance targets, also known as parameters. If an employee fails to meet those parameters, CMBC may proceed to consider whether or not the employee should be terminated at an Employment Status Review (“ESR”). Employees may be terminated for failure to meet Level 3 parameters.

The key to the program was identifying operators who had “unacceptable” levels of absenteeism. An unacceptable level of absence was defined as absences that equal or
exceed the company’s average. The average is the average number of absences of all company employees, whether or not due to a disability. Once an employee had been identified as having an unacceptable level of absenteeism, he/she received a notice and was monitored. If the rate did not improve, the employee progressed through a series of stages identified in the AMP which consisted of informational discussions, formal letters, a medical assessment, an interview and a letter requiring the employee to meet prescribed attendance targets.

If the employee failed to meet the prescribed attendance targets, he or she could be moved to Stage 4, where an assessment would be made as to whether or not the employee’s employment should be terminated.

It is important to note that the absences that would trigger monitoring, i.e., absences that were “unacceptable”, included absences due to short-term disability, long-term disability or WBC absences. Such absences are almost invariably caused by injury or illness which amount to a physical or mental disability. The inclusion of such absences increased the absenteeism rate of such employees.

The Tribunal determined that:

1. some Coast Mountain employees have disabilities;
2. the presence of these disabilities was a factor contributing to the levels of their absenteeism;
3. some employees had excessive attendance and were initiated into the AMP as a result;
4. unacceptable attendance was attendance that equalled or exceeded the company overall average which average was calculated on absences due to both disabilities and to unrelated matters;
5. the absences of such employees initiated into the AMP included disability related absences.

The Tribunal concluded that by merely being initiated into the AMP, some employees received adverse treatment because they were thus identified as an attendance problem and ultimately faced dismissal under the plan. The employee’s disability was a factor in being exposed to such adverse treatment because it was that disability which caused the employee’s absenteeism to be unacceptable.

There were a number of ways in which the AMP had an adverse impact on employees with disabilities, particularly employees with chronic or recurring disabilities which had impacted their ability to attend work:

1. by being initiated into the AMP, an employee with disability caused absenteeism was required to meet the required standard (based on the average absences of employees with and without disabilities);

2. an employee initiated into the AMP progressed part way through it without the benefit of a review of the circumstances of his or her disability;

3. the medical information reviewed failed to include the cause of an employee’s absenteeism and failed to include the combination of needs of an employee experiencing disability related absenteeism;

4. there was inadequate supervisory input;

5. the advice of the Occupational Health Group of Coast Mountain was not solicited, so there was little medical input available at the initial stage to determine if an employee’s absence was disability related or to assess any accommodation issues.

The Tribunal concluded that an employer cannot impose an average attendance standard on an employee without modification for the medical issues which cause that employee to have a higher than average rate of absenteeism.
The Tribunal held that it is not sufficient to say that, at some point in the process, there may be an accommodation reached after it has been determined that the employee has exceeded the standard. In fact, such an approach is contrary to the directions of the Supreme Court of Canada in *Meiorin* which indicates there must be accommodation within the standard, not just a standard set with the possibility of accommodation at end stages.

Following the Tribunal’s decision, Coast Mountain sought judicial review of, *inter alia*, the conclusion that the AMP was discriminatory. In *Coast Mountain Bus v. CAW-Canada*, 2009 BCSC 396, Mr. Justice Hinkson arrived at the following conclusions:

[170] I am not prepared to disturb the Tribunal member’s conclusion that the group she identified for the purposes of dealing with the complaint that she reviewed was correct.

[171] I am also not prepared to disturb the Tribunal member’s conclusions with respect to accommodation and delayed accommodation respecting specific identified operators or her conclusion that applying average absenteeism rates to employees already placed in the petitioner’s AMP at Level 3 or before is discriminatory.

[172] I am further not prepared to disturb the Tribunal member’s conclusion that the treatment of part-day absences within the AMP was incorrect.

[179] In the result, I allow the petition, insofar as it relates to the petitioner’s overall AMP, but uphold those portions of it that relate to specific identified operators.

Mr. Justice Hinkson quashed the tribunal’s finding that the application of the Coast Mountain AMP to the twelve employees considered was in and of itself discriminatory, as well as the finding that early placement of operators in the AMP, is, in and of itself, discriminatory. He also quashed the findings that the AMP is discriminatory because it created stress on those placed within it as a result of letters from the petitioner, Coast Mountain. Similarly, the Court quashed the finding that the AMP failed to
accommodate its employees or delayed in so doing, with the exception of the finding respecting the specific identified operators. In essence, Mr. Justice Hinkson confined the scope of the tribunal’s finding to the twelve employee operators who’s specific circumstances the tribunal member assessed. The 2008 decision, nevertheless, provides a graphic illustration of the problems which can flow from the application of an AMP.

Obviously, the initial “tell” or “flag” is the employee’s absenteeism rate. Notwithstanding that it may be in excess of the standard absenteeism rate, the employer should analyze the reason for the absences and, if they are disability related, refrain from initiating or advancing the employee into the AMP. Alternatively, the AMP should contain a set of procedures that specifically address employees with disability caused absences. If the absence is caused by a disability, consider whether or not it can be accommodated, i.e., can the employer withstand or tolerate the absenteeism (with accommodation where possible and reasonable) caused by the employee’s disability issues without undue hardship? If so, the employee should not be initiated into a “one size fits all” AMP and be exposed to the adverse consequences of it.
5. **SUMMARY**

The right to terminate the employment of an employee for absenteeism starts with an assessment as to whether or not the number of absences can be said to be “excessive”. The standard in the Attendance Management Plan (if one exists) is not determinative. If the absenteeism is “excessive”, the employer needs to know the cause in order to engage in the appropriate disciplinary or non-disciplinary response. If the absenteeism is caused by a disability, the employee should not be initiated into the AMP if to do so could have adverse consequences on him or her without the benefit of accommodation by the employer. If the facts disclose that there is no reasonable prospect of improved attendance in the future and that any reasonable attempt at accommodation would impose an undue hardship on the employer, a dismissal based on the absenteeism will be upheld. Although the dismissal may be, *prima facie*, discriminatory, the employer will fall within the *bona fide* occupational requirement exception, as it has met its duty to accommodate.