

HUMAN RIGHTS ALERT

Attendance Management Green Light?

The Resuscitation of Attendance Management Programs (AMPs)

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The duty to accommodate disability related absenteeism continues to challenge employers in connection with using Attendance Management Programs (AMPs) to encourage employees to provide regular attendance at work.

The most critical assault on the AMP as a vehicle to encourage levels of attendance consistent with business interests attended the British Columbia Human Rights Tribunal decision in the *Coast Mountain Bus Company* case released in 2007. (My analysis of the 2007 Human Rights Tribunal decision can be reviewed in the article "Has the *Coast Mountain Bus Company* Decision Struck a Fatal Blow to Employer Attendance Management Programs?", available on our website.

The potentially fatal blow to AMPs struck by the BC Tribunal decision arose out of the following findings:

1. That the application of AMPs to individuals with disabilities represented *prima facie* discrimination;
2. That placing operators (*with disability related absenteeism*) into the AMP was, on its face, discriminatory;
3. That the AMP was discriminatory due to the fact that it placed stress on operators with disability issues who were enrolled into an AMP.

Those findings raised a serious question as to the supportability from a human rights perspective of utilizing AMPs in the context of employees who experienced disability related absences.

Resuscitation of AMPs

Employers have a significant interest in securing levels of attendance required to accomplish the objectives of the business. Employers have an interest in having the right to develop, implement and utilize AMPs to support the attendance goals and needs of the organization.

Good News...

Recent court and arbitral decisions are recognizing the importance of an employer's access to the AMP as a means of responding to absenteeism and encouraging the attendance levels required to support the business objectives of the organization. These recent decisions do not give employers carte blanche in terms of the structuring or administration of AMPs. They do sanction and support the structuring and administration of AMPs that evidence the following:

- A balancing of the interests of the employer and individual with accommodation needs;

- An integration of the duty to accommodate into the AMP.

These decisions provide useful direction as to the required elements of a sustainable AMP; including:

1. Development of a comprehensive AMP: *contents address the issue of types of absences included excluded in triggering progression through steps; terms incorporating the duty to accommodate; terms reflecting individual assessments; etc.*
2. Fairness: *particularly in the context of responding to absences that trigger accommodation needs.*
3. Individual Treatment: *evidence of consideration of an individual with accommodation needs specific circumstances.*
4. Flexibility: *exhibit degree of flexibility for individual progressions through steps.*

A review of the context and approach of the recent court and arbitral decisions breathing new life into the Attendance Management Programs discloses the key elements of the sustainable AMP and requirements for supportable applications of AMPs in the context of disability related absenteeism.

USW vs. Henniges Automotive [2008] O.L.A.A. No. 571 (R. Levinson)

The case involved an unsuccessful challenge by the Union to the progression of an employee through the six steps of a comprehensive AMP and resultant termination. The employee's persisting multiple absences resulted in his progression through the six steps and ultimate termination.

To understand the context in which the arbitrator considered the application of the AMP by the employer, it is useful to note the following facts:

1. Prior to the 2005 termination, the employee had progressed through to step 5 of the AMP on two prior occasions.
2. The existence of medical evidence, generated several months after the termination that failed to clear the employee for a return to work (*attending post termination surgery*).
3. The terminated employee did not testify at the hearing.

The Union's challenge to the termination was based on their position that excluded absences including all WSIB claims; regardless of whether the claim was accepted and benefits paid. The arbitrator rejected this argument.

In considering the broader issue of whether the grievor's progression and ultimate termination under the AMP represented a discriminatory act, the arbitrator held that there was no discrimination; finding that the employer had accommodated the grievor's disability issues in connection with his progression through the steps of the AMP (*to the point of undue hardship*).

Factors Prompting Arbitrator to Conclude Progression Through AMP Was Not Discriminatory

In considering the analysis of the arbitrator, there were a number of factual circumstances that led to the conclusion that the employer had accommodated the grievor to the point of undue hardship, before terminating the grievor. The circumstances were as follows:

- The program terms evidenced a comprehensive AMP;
- The program built in allowances for particular circumstances;
- Evidence that the employer had considered the individual circumstances of the employee in applying the AMP;
- The employer had not applied the program in an arbitrary or mechanical manner;
- The absence of evidence of any future rehabilitative prospects for the grievor.

Of further relevance was the Arbitrator's endorsement and application of the principles developed in the *McGill University Health Centre* decision of the Supreme Court ([2007] 1 S.C.R. 161):

- The AMP terms had been negotiated with the Union;
- Terms negotiated by the parties in a collective agreement can and should be of significance when assessing the duty of reasonable accommodation (**clear indication of party's intent regarding accommodation*);
- The AMP was a significant factor to consider and determining if the employee had been accommodated to the point of undue hardship.

The foregoing circumstances prompted the arbitrator to conclude that the AMP had been properly administered and that the employee had been accommodated to the point of undue hardship.

Message

The supportability of and weight given to AMPs by arbitrators, tribunals and courts will be impacted by the following:

- Comprehensiveness of the program
- In unionized setting, negotiation of the program between the Union and employer
- Fairness of the provisions in the AMP
- Demonstration of individualized treatment of employee
- Evidence of absence of rehabilitative prospects

CAW Local 111 vs. Coast Mountain Bus Company – BC Supreme Court (March 25, 2009)

A recent decision of the British Columbia Supreme Court should refresh and restore employers' confidence in progressing employees with disability related absences through the progressive steps of an AMP, assuming accommodation analysis and activity is incorporated into the development and administration of the AMP.

Caution – it is important to understand the limits of the Supreme Court's intervention into the BC Human Rights Tribunal's findings in Coast Mountain. While the Court rejected the

Tribunal's findings rendering any application of AMPs to persons with disabilities as discriminatory, the Court did not interfere with the Tribunal's determinations regarding the application of the AMP to the specific individual employees progressed through the AMP. This is an important distinction. Prior to commenting on the significance of the nature and scope of the Supreme Court's interventions, it is useful to summarize what the Court did and did not overturn.

The Court did not disturb the following conclusions/findings of the BC Human Rights Tribunal:

1. Findings with respect to accommodation and delayed accommodation experienced by the specific operators (*i.e. findings of failure to accommodate to the point of undue hardship*).
2. Findings that the application of average absenteeism rates to employees placed in AMP at level 3 was discriminatory.

The Supreme Court found that the Tribunal erred and quashed the Tribunal decisions with respect to the following matters:

1. That the application of AMPs to identified groups (*i.e. disability*) was in itself discriminatory.
2. The early placement of operators into AMPs was generally discriminatory.
3. That the AMP was discriminatory as a result of the creation of stress on those who were placed into the AMP.
4. That the AMP was problematic due to the issue of confidentiality.
5. That the AMP failed to accommodate operators (*generally*) or delayed in doing so (*note: exception – findings re: specific operators*).
6. That the AMP was not a bona fide occupational qualification.

In summary, the Court allowed the petition as it related to the general discriminatory characterization of AMPs; but supported the Tribunal's decisions with respect to the application of the AMP to the particular operators. (*Note: The Tribunal determined that the employer had breached the duty to accommodate in connection with the progression of specific operators through the AMP, and awarded financial damages for the resultant impact*).

Employers have an interest in accurately recognizing the significance of the BC Supreme Court decision:

1. The Court has rejected the suggestion that any application of AMPs to identified groups represents *prima facie* discrimination.

Result: There is latitude to utilize AMPs to respond to attendance concerns with employees whose absences include disability related absenteeism.

2. The Court supported the need to ensure that the duty to accommodate is integrated into the structure and administration of an Attendance Management Program.

Key Elements of the AMP Revival

AMPs are endorsed as an important instrument of attendance management. Employers have an interest in ensuring that the terms, structure and administration of AMPs incorporate the elements and approaches that will position the employer to discharge the *duty to accommodate* in connection with progressing employees with disability issues through AMPs.

Key to Sustainability of Progressions and Decisions Consistent with the Duty to Accommodate

AMP Development: Elements and Structuring

1. **Develop comprehensive AMP:** *Define excluded absences; incorporate duty to accommodate; reflect flexibility to respond to individual circumstances.*
2. **In Unionized setting:** *Negotiate elements of AMP that evidence party's intent re: scope of the duty to accommodate.*

AMP Administration: Requirements

1. **Individual Treatment:** *Pursue and evidence consideration of needs and circumstances specific to individual with accommodation needs.*
2. **Flexibility:** *Pursue and evidence flexibility with respect to individual progression through steps.*
3. **Fairness:** *Pursue and exhibit fairness, particularly in the context of progression of employee with accommodation needs.*

Contact: For support in managing the challenges discussed above, contact Barbara Humphrey at bhumphrey@sbhlawyers.com or 416-862-1616.

Workshop: Register in our upcoming program to support you in facilitating a successful Attendance Management Program.

“Attendance Management Workshop: Taming the Beast” – see attached for details.



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Attendance Management Workshop: Taming the Beast

Date: Wednesday, June 3, 2009

Time: 9:00 a.m. to 12:30 p.m.

Location: Delta Toronto Airport West

Presenter: Barbara G. Humphrey

Successful Attendance Management is more critical than ever for employers in these times. With reduced head counts and demand for great efficiencies, regular attendance is critical.

This workshop will provide those responsible for attendance management with the necessary tools, knowledge and strategies to support more effective Attendance Management.

The program will include:

- Understanding legal parameters impacting attendance management
- Managing the medical documentation challenge attending attendance management (strategies and tools)
- Integrating the duty to accommodate into attendance management
- Developing legally supportable AMPs
- Evaluating your attendance management program and strategy
- Key elements/tools to implementing and administering effective attendance management programs and activity

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