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Excessive Absenteeism and Reasonable Accommodation: Where to Draw the Line?

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Some employers may feel caught off-guard when one of their employees is absent from work for lengthy and sometimes repeated periods of time, owing to a medical condition. On the one hand, most employers today are well aware of their duty to accommodate employees with disabilities of whatever nature. On the other hand, the chronic, if not excessive, absences of such employees can give rise to operational difficulties for employers, who nevertheless wish to comply with their obligations. In such circumstances, employers face a legal dilemma which is not easily resolved: at what point does an employee's excessive absenteeism due to illness become an excessive constraint, allowing the employer to terminate the employee for administrative reasons?

An overview of a few recent arbitral awards on this subject can help us identify the applicable principles for assisting employers in managing employee absenteeism while complying with their obligations.

For example, in *Syndicat de la fonction publique et parapublique du Québec (SFPQ-Fonctionnaires)* c. *Gouvernement du Québec (Ministère du Travail, de l'Emploi et de la Solidarité sociale) (Diane Descôteaux)*[1], a socio-economic assistance officer who was suffering from a degenerative lumbar condition had been absent from work on numerous occasions for that reason since 2008, without returning to her job for periods greater than a few months. Between 2010 and 2015, her absenteeism rate was 79 per cent. In January 2015, she provided her employer with a medical certificate authorizing her progressive return to work, effective January 12, 2015, to be followed by her return to full-time employment as of February 23, 2015. Wishing to validate the employee's fitness to work, the employer required her to undergo medical assessments before resuming her job. Those evaluations confirmed that the employee was fit to return to work progressively, while expressing serious reservations about her short, medium and long-term prognosis, and mentioning a significant risk of a relapse before the end of that year. Relying on those expert findings, the employer decided to terminate the employee's employment for administrative reasons, as of May 1, 2015. The union, contesting the termination, produced in evidence two medical reports indicating a very positive prognosis, if one discounted the magnetic imaging reports filed in the record.

Confronted with this inconsistency and several other contradictions in the evidence submitted by the experts for the union, the arbitrator accepted the testimony of the employer's experts regarding the employee's prognosis and her risk of relapse. Moreover, the arbitrator held that the fact that the employer had been obliged to redistribute the employee's workload among her co-workers during her absences, and the fact that it had to organize refresher trainings when she returned to work, without her reaching the expected level of performance, constituted additional constraints for the employer.

Since the employer was therefore no longer able to accommodate the employee without entailing excessive constraints on its operations, the arbitrator upheld the termination. He held, however, that although the employer had been entitled to require that the employee undergo medical evaluations before authorizing her return to work, the employee should

have received her full salary from the time she was pronounced fit for full-time work by the employer's experts, in accordance with the holdings of the Supreme Court in administrative termination cases.[2]

In *Loiselle* c. *Société des alcools du Québec*[3], the employer terminated an employee for administrative reasons under quite different circumstances. The employee had an absenteeism rate of nearly 43% between 2006 and November 2008, and her absences were always justified by medical certificates enumerating various causes, without the employee ever having received any diagnosis of any specific medical condition. Alarmed by this absenteeism rate, which it deemed excessive, the employer gave the employee a notice stating that an administrative review of her absences from work would take place over the ensuing six months. Far from improving, however, the employee's absenteeism rate rose to 54 per cent during those six months, which led the employer to terminate her employment for administrative reasons, in May 2009.

In doing so, the employer based itself, among other things, on the opinion of an expert physician, stating that the employee was unable to provide the work performance expected for the foreseeable future, especially since the employee was not suffering from any specific or diagnosed medical condition that could explain such a high absenteeism rate.

In the arbitral hearing held a few years later, the employee alleged that she had suffered from psychological disturbances that explained her absences and blamed the employer for having failed to accommodate her on that basis. The arbitrator ruled that the evidence submitted to him, including a large number of reports and sworn statements by medical experts, did not support that explanation. Without any physical or psychological disability explaining the absences concerned, or any perception of a handicap on the employer's part, the employer had amply fulfilled its duty to accommodate, having shown patience and having proposed an administrative follow-up process permitting the employee to reduce her absenteeism rate, which was not successful. On those grounds, the arbitrator maintained the employee's termination.

These decisions demonstrate that in order to manage employee absenteeism properly, employers must take certain concrete steps from the onset of any employee's disability. Employers must document adequately all periods of absence of the employee in question, as well as all measures taken to compensate for such absences, including the costs and constraints associated with such measures. Employers would also be well advised to have medical examinations carried out on employees with high absenteeism rates before making any final administrative decisions regarding their employment. Employers must also ensure that they pay any employee his or her salary as soon as he or she is declared fit to work and wishes to resume his or her job, even if the employer is still awaiting the results of expert examinations, before making enlightened decisions in such cases.

Even where employers have followed all these recommendations, it remains vital that they always check into the specific situation of any employee who is facing a health-related problem that triggers numerous absences from work, in order to make sure that they have fulfilled their legal obligations towards such employees. Our labour and employment law experts are available to help you assess such cases and to assist you in making the best possible decisions for your business in each and every one of these cases.

[1] 2019 QCTA 47

[2] See *Cabiakman* c. *Industrial Alliance Life Insurance Co.*, [2004] 3 SCR 195.

[3] 2018 QCTA 757.

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