

THE COMPLEXITIES OF ATTENDANCE MANAGEMENT AND PROGRESSIVE DISCIPLINE

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Attendance management and discipline are amongst the issues most commonly faced by employers. While the principles of attendance management and progressive discipline may appear to be straightforward, applying them in “real life” rarely is. A recent decision from Arbitrator Slotnick highlights the complexities often faced by human resources professionals, and is a reminder of the importance of employing a contextual and balanced approach to the application of these policies in the workplace.

The Facts

The Grievor in this case stopped working in November 2014, after being stabbed in the hand during a violent altercation outside of work. The Company was unable to offer him accommodated duties at the time, and so short-term disability benefits were approved until May 2015. In June 2015, the Company found duties that fit the Grievor’s restrictions and so instructed him to return to work. Upon his return, the Grievor presented the Company with a medical note indicating that he could not return to work due to “work stress”. Confused as to why the Grievor was experiencing workplace stress despite having been absent from work for 7 months, the Company provided the Grievor with a questionnaire to be completed by his physician. The Grievor was asked to return the completed questionnaire in a few weeks, failing which discipline would be imposed.

The Company had an attendance management policy, which had been signed by the Grievor, that defined a “culpable absence” to include absences unsupported by medical documentation. The policy specifically stated that progressive discipline would be imposed if an employee failed to provide a doctor’s note after having been notified that one would be required. The Company’s collective agreement spelled out the specific progressive disciplinary steps that would be taken by the Company in response to employee misconduct – including warnings (verbal and written), suspensions (of varying lengths), followed by discharge.

The Grievor failed to provide the medical documentation by the deadline stipulated by the Company. At the time this occurred, the Grievor (a six-year employee), had a lengthy discipline history that included all of the types of discipline outlined in the progressive discipline clause of the collective agreement. The most recent discipline on file, a five-day suspension, was for failing to provide sufficient documentation to support an illness-related absence (in other words, similar misconduct).

The Company determined that the Grievor’s failure or refusal to provide medical documentation by the deadline constituted misconduct. Given the Grievor’s disciplinary history and relatively short service, and in view of the progressive discipline clause of the collective agreement, the Company determined that termination was appropriate. However, before it could impose this discipline, the Company received a note from the Grievor’s physician stating that the questionnaire would not be completed as requested because medical documentation had recently been provided to the Company’s third-party short-term disability (“STD”) adjudicator. The Company considered this letter but nevertheless proceeded to process the Grievor’s dismissal. In the Company’s view, the Grievor’s failure or refusal to

provide medical documentation constituted a culminating incident in a long history of misconduct, thereby justifying his termination for cause.

The Decision

The Union grieved the Employee's dismissal. At arbitration, its arguments were twofold: (1) that there was no misconduct; and (2) that even if some discipline were warranted, termination was not an appropriate or mandatory next step in the progressive disciplinary process.

Arbitrator Slotnick found in favour of the Union, holding: (1) that there was no cause for discipline; and (2) that the Company had ignored relevant facts and therefore applied its attendance policy and progressive discipline clause too "mechanically". Arbitrator Slotnick found that the Company should not have terminated the Grievor's employment because it knew, at the time of termination, that he was pursuing a claim for additional STD benefits, and had provided the third-party STD adjudicator with detailed medical documentation. Arbitrator Slotnick found that, while the Company's concerns about "work stress" were legitimate and understandable, it ought to have waited until the STD adjudicated its decision on whether to support or decline the Grievor's request for additional STD benefits.

Arbitrator Slotnick clarified that, while it is not open for employees to hide behind the inadequate responses of their physicians, in this case the Grievor had not behaved in a manner that was "intentionally uncooperative". The Grievor fully believed that his physician would provide the Company with a completed questionnaire by the required deadline. The physician had, largely on her own initiative, acted as an "advocate" for her patient, refusing to provide answers that she felt were duplicative to the information that she had supplied to the STD adjudicator, and which she felt would disclose confidential information about the Grievor's mental illness to his employer. In sum, while there was a "technical breach" of the Company's attendance policy, the Grievor's failure to supply required medical documentation was inadvertent on his part. As a result, the Grievor was reinstated to his employment effective the date of his termination. He was placed on a leave of absence without pay, meaning that no back pay was ordered to be paid to him. However, he was free to claim any disability benefits to which he may have been entitled during this leave.

Implications for Municipal Employers

The outcome in this case was highly driven by its unique facts. Nevertheless, it serves a cautionary tale for employers on the challenges that can be associated with imposing discipline in the context of attendance management. Policies, including progressive discipline and attendance management policies, cannot be applied in a rigid or mechanical fashion. Individual circumstances must be investigated, considered and appropriately weighed by the employer prior to the imposition of discipline. If they are not, or if disciplinary decisions are made in haste, the employer could be exposed to significant monetary damages or, at a minimum, to having their disciplinary decisions overturned.



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