NON-CULPABLE OR INNOCENT ABSENTEEISM: Termination upheld because grievor failed to show he was capable of attending at work regularly in the foreseeable future and accommodation process was exhausted

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In the recent arbitration decision of *Vancouver Coastal Health Authority* v. *Hospital Employees' Union (Termination for Non-Culpable or Innocent Absenteeism)*, [2016] B.C.C.A.A.A. No. 112, Arbitrator John Sanderson, Q.C. upheld a grievor's dismissal for non-culpable or innocent absenteeism because he failed to show he could attend at work regularly in the foreseeable future and the accommodation process was exhausted.

Background

The grievor continually missed work for a number of medical and non-medical reasons. This had a serious impact on the employer's operations. His absenteeism rate averaged at 45 percent, which was around seven to nine times higher than that of his co-workers. The employer tried to accommodate the grievor on various occasions but its attempts were unsuccessful. In a final accommodation effort, the employer offered to transfer the grievor to short call casual status, which would have reduced his work hours but allowed him to maintain employment. The grievor rejected the offer because he would no longer have been entitled to long-term disability benefits. The employer saw no other way to deal with the grievor's excessive absenteeism and terminated his employment. The union grieved the termination alleging that the employer failed to accommodate the grievor.

Arbitration Award

The arbitral jurisprudence in British Columbia is clear that an employer may dismiss an employee for non-culpable or innocent absenteeism where the employer establishes that the employee has been excessively absent, and the employee fails to show that he or she is capable of regular attendance in the foreseeable future. The case law is also clear that an employer is deemed to have discharged its obligation to accommodate where the employee rejects a reasonable offer of accommodation.

Excessive absenteeism can ground termination of employment

Arbitrator Sanderson upheld the termination because the grievor failed to show that he could fulfil his employment obligations in the future or that he was able to attend at work regularly in the foreseeable future. In *British Columbia Transit* v. *Independent Canadian Transit Union, Local 2 (Park Grievance)*, [1998] B.C.C.A.A.A. No. 24, Arbitrator Sanderson explained that an employee must provide cogent evidence "to affirmatively prove a reasonable prognosis for regular attendance in the future" where an employer has established excessive non-culpable or innocent absenteeism. This has been affirmed in other arbitration awards, such as *Re Canadian Post Corporation -and- Canadian Union of Postal Workers*, [1982] C.L.A.D. No. 3, where Arbitrator Kevin Burkett found that "where the employee's attendance record and surrounding circumstances support the inference that he is not likely to be regular in attendance in the future, it falls to the employee, both at the time of termination and, if effected and appealed, at the arbitration hearing, to rebut the inference that he is incapable of regular attendance in the future".

In the *Vancouver Coastal Health Authority* case, the grievor admitted under cross-examination that his health problems would not improve in the foreseeable future, if ever. The grievor also failed to produce documentary evidence to support his return to work and further failed to make his physicians available for cross-examination as the employer had requested. As such, Arbitrator Sanderson was unable to accord weight to the grievor's medical evidence. The grievor consequently had no credible medical evidence concerning his ability to work in the future, and there was no reasonable option but to uphold the termination.

Duty to accommodate is satisfied where reasonable offer is made and rejected

The employer advanced the position that its attempt to accommodate the grievor by offering him short call casual status was reasonable in all of the circumstances. Anything beyond this offer, the employer submitted, amounted to undue hardship.

The Supreme Court of Canada addressed this issue in *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970, where it was explained that an employer's duty to accommodate is discharged where the employee is made and rejects a reasonable accommodation offer.

Arbitrator Sanderson found that the employer's proposal was indeed reasonable and, because of the grievor's rejection of the proposal, the accommodation process was at an end.

Takeaways

- Employers may dismiss employees for non-culpable or innocent absenteeism where the employee is incapable of regular attendance at work in the foreseeable future.
- The accommodation process can be exhausted where the employee is made and rejects a reasonable offer of accommodation.

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