

Ready, Fired, Aim? A Flawed Strategy



When facing the difficult decision to end an employee's employment for cause, it is very important not to jump to conclusions. Although this may sound obvious, the case law is replete with examples where employers used the illadvised strategy of "ready, fire, then aim." Such decision-making often leads to expensive and embarrassing public decisions.

Such was the situation in the recent decision in *United Steel Workers, Local 7656 v Mosaic Potash Colonsay ULC*, 2014 CanLII 23963. In this decision, the arbitrator reinstated a short-term employee who had been fired for dishonesty and misuse of sick leave after a dispute about the use of vacation time. This reinstatement occurred even in circumstances where surveillance showed the grievor working at his landscaping business while off on sick leave.

Communications Key to Stress-Related Leave

The grievor was a heavy machine operator at a potash mine. He operated a large underground rock cutting machine. He had 120 hours of banked vacation time and put in a request for two vacation periods totalling 70 hours. The employer informed the employee that he was only able to take one of the periods because the company required all employees to hold 80 hours of vacation time to coincide with a scheduled mine shut down. There was some confusion in communicating this message to the employee, and when the employee sought clarification, the employee's supervisor became very hostile and aggressive. As a result, the employee became very upset and did not come in the next day for stressrelated reasons.

The employee followed the administrative procedures necessary to access sick leave benefits and provided a doctor's note describing his limitations. When the medical information was provided to the company, the administrator immediately disputed the claim and told the employee that "it was not going to take this." This exchange upset the employee further and he delivered an additional doctor's note recommending that the employee take three weeks off work.

The employee stayed off work during this period. Even though this sick leave coincided with the original period requested as vacation, the employee did not attend the activities he had planned because he was too stressed to do so. When the three week period had ended, the employee was cleared to return on modified duties so as to determine whether the medication he had been prescribed would interfere with the operation of heavy machinery.

Suspicious, Investigations and Suspensions

The employer was immediately suspicious of the employee's sick leave claim and hired a private investigator to conduct surveillance on the grievor. They found the grievor performing physical work for the landscaping business he operated on the side. The employer had full knowledge of the employee's business, and indeed he used his landscaping truck to commute to and from the mine site.

When the employee returned to work he was immediately suspended and the employer demanded detailed information regarding the employee's diagnosis and the details about his work activities. The employee provided a full copy of his medical file and informed the employer about his landscaping work while he was on sick leave.

Look Before You Leap

Upon receipt of this information and without asking for any additional information, the employer terminated the grievor claiming "dishonesty and duplicity with respect to [his] alleged sick leave." In addition, the employer wrote to the disability provider and attempted to have it reclaim the sick leave benefits paid to the employee.

At the hearing, the employer maintained that the grievor had sought sick leave benefits after his vacation request had been denied and that he had performed personal work activities that were incompatible with his claim that he was disabled from performing his job duties.

The arbitrator disagreed and took a dim view of the employer's position.

What this case highlights for HR professionals and managers is the importance of communicating with clarity, and a modicum of compassion, all policies regarding organizational restriction of vacation-time during key periods. Moreover, as with "call before you dig" or "look before you leap," "talk to doc before you fire" goes a long way to avoiding embarrassing scenarios as such.

After all, a little time in someone else's garden on stress leave, might have been just what the doctor ordered.