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**Attendance Management Programs:
Doing It Right**

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Executive Summary

Absenteeism can be a costly and disruptive problem in an organization. In fact, 1997 figures indicate an annual average of 7.4 days of absence from work per full-time worker in Canada. An increasingly common approach by employers to deal with this problem is the use of attendance management programs. However, attempts by employers to control absenteeism through attendance management programs have not gone unchallenged by unions. To avoid these challenges, employers need to be aware of certain principles established in the jurisprudence regarding absenteeism and attendance management programs.

- There are several principles that have guided arbitrators in their decisions on grievances concerning absenteeism: the distinction between culpable and innocent absenteeism, the protection of employees with respect to benefits entitlement, the protection provided to employees under Human Rights legislation, and the prerequisites for establishing unilateral rules at the workplace.
- The concept of innocent absenteeism, for which an employer may not discipline an employee, was introduced in the **Massey-Ferguson Ltd.** case in 1969. This landmark decision forced employers to distinguish between culpable and innocent absences. Culpable absenteeism has been identified as lateness or leaving early, failure to notify, absence without leave, and abuse of leave, and can be subject to disciplinary measures. Common examples of innocent absenteeism are illness, injury, disability, and family responsibilities—absences beyond the employee's control.
- Arbitrators have agreed, however, that after a certain stage the employer requires the power to terminate an employee for innocent absenteeism. As a result, a two-fold test under which employers may discharge an employee for innocent absenteeism was established in a 1972 case, again involving **Massey-Ferguson Ltd.** In order to justify a discharge the employer must establish undue absenteeism and an inability of regular attendance.
- Arbitral decisions have established that employees receiving benefits under a disability plan cannot be terminated for innocent absenteeism if the disability plan requires employee status for continued benefits.

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About the Author

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- Human rights legislation prevents discrimination against employees because of disability or handicap. The employer has the duty to accommodate to the point of undue hardship, as determined on an analysis of the relevant facts. Possible relevant facts that have been identified are financial cost, problems of morale among co-workers, the interchangeability and flexibility of the workforce and facilities, and the size of the operation.
- An attendance management program must have unilateral rules that are consistent with the collective agreement, are not unreasonable, are clear and unequivocal, and are brought to the attention of employees before implementation. Employees must be notified that a breach of the rules could result in discharge. The rules, once introduced, must be enforced consistently.
- A basic definition of a single incidence of absence is one continuous or uninterrupted occasion of absence due to illness or sickness. All the attendance management programs reviewed in this paper contained a ‘triggering’ incident—an accumulation of a specific number of absences before the program is invoked. Once the employee is in the program, there are a series of steps with defined, clear-cut limits within which the employee may operate and which become increasingly strict the longer the problem continues.
- Between 1990-1998, nine cases of grievances relating to attendance management programs were reported in Labour Arbitration Cases. Of these nine, six were decided in favour of the employer and the remaining three in favour of the union.
- The nine grievances raised issues of reasonableness, inconsistency with the collective agreement, elements of discipline within the program, and unfairness of the program’s application. The awards in favour of the union were primarily based on the conclusion that the attendance management program failed to uphold a required standard of reasonableness.
- Some general guidelines on designing and implementing attendance management programs can be drawn from the analysis of the nine grievances: avoid inconsistency with the governing collective agreement; avoid disciplinary elements for innocent absenteeism; and avoid unreasonable elements.
- The reasonableness issue is more complex and contentious and appears to be in a state of evolution.

Absenteeism in the Canadian Labour Context

What is Absenteeism?

Most of the literature on absenteeism views it as an attitudinal problem that reflects job dissatisfaction, organizational culture and personal characteristics (Judge and Martocchio 1994; Nicholson and Johns 1985; Clegg 1983). There is little or no acknowledgement of absences that arise without fault of the employee. Some of the recent literature appears to have moved away from this traditional view of absenteeism. A broader definition of absenteeism has emerged that encompasses both voluntary and involuntary absences, such as those resulting from illness, injury, miscellaneous personal reasons, and family responsibilities.¹ This view of absenteeism also recognizes it as a problem that is preventable to some degree, by the actions of either the employer or the employee (Booth 1993, 19; Kelly 1996, 1-1).

There has also been a parallel shift in the arbitral view of absenteeism. Based on a 1969 case, *Massey-Ferguson Ltd.*,² arbitrators now make the distinction between culpable and innocent absenteeism, which corresponds with the concept of voluntary and involuntary absences. The decision in *Massey-Ferguson Ltd.* recognized that there were circumstances beyond the control of an individual that result in that individual's being unable to report to work when scheduled. As a result, the jurisprudence has developed several principles that help guide employer responses to the issue of absenteeism. These principles will be outlined in a later section. First, let us consider the significance of the problem of absenteeism in Canada.

Why is Absenteeism a Significant Issue?

Extent of Absenteeism in Canada

Statistics Canada (1998) reported that in 1997 almost half a million full-time employees were absent from work each week for personal reasons, such as illness, injury, disability, caring for children or elder relatives, and other personal or family responsibilities. This weekly figure translates to an annual average of 7.4 days per full-time worker, or 3.0 per cent of total working time.

One drawback with the statistical data currently available is the difficulty in differentiating between voluntary and involuntary absenteeism. Statistics Canada derives its figures from the monthly Labour Force Survey (LFS), which asks individuals whether or not they worked their usual hours during a particular week, and the reasons for any absence. While the LFS measures time lost as a result of illness, disability and personal or family responsibilities, it does not have the ability to differentiate between voluntary and innocent absenteeism. However, Statistics Canada suggests that the LFS data on all absences for personal reasons can be analyzed for trends and patterns that may indicate the effect of voluntary absenteeism.

1 The Conference Board of Canada (Booth 1993, 6) identifies absenteeism as an absence (with or without pay) of an employee from work due to his/her own illness, disability, personal or family responsibility for a period of more than a half-day but less than 52 consecutive weeks. Personal or family responsibility includes: taking care of children or other family members, taking family member to doctor/dentist. Not included are: maternity, adoptive and paternal leave; other prearranged leaves of absence; vacations and holidays; bereavement leave; jury duty; other non-controllable absences.

2 For full citation of cases in this report, see the Index of Cases on p. 21.

A broader definition of absenteeism has emerged that encompasses both voluntary and involuntary absences.

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Variations within the Canadian Labour Market

The levels of absenteeism and reasons for its occurrence are dependent on many variables in the Canadian labour environment. Statistics Canada identifies seven key factors that affect the absence rate for employees:

- family circumstances;
- the physical health of the worker;
- the work environment;
- the degree of job stress;
- employer-employee relations;
- union coverage; and
- work schedules.

Of these seven factors, four appear to cause noticeable differences in absence averages, and warrant specific mention: family circumstances, physical health, working environment, and union coverage.

In 1997, women lost more working time on average than men for illness or disability (7.6 days versus 5.3), as well as for personal or family responsibilities (1.5 days versus 0.9). Furthermore, the presence of preschool-aged children greatly increased the average number of days absent due to personal or family responsibilities, especially among women, who lost on average 4.2 days, compared to only 1.8 days for men. These averages suggest that family circumstances that affect absence rates are more applicable to women, who may still hold the traditional role as the primary care giver of a family (Hanson and Weinstein 1995).

Absences also increased with age, as workers aged 15 to 24 lost on average 5 days or less, while workers between the ages of 55 and 64 averaged close to 11 days of absence. These figures seem to indicate that younger workers are generally in better physical condition, and are less likely to become ill or sick, or remain ill or sick.

The number of days lost were also higher in occupations that were characterized as more physically demanding, hazardous or stressful; nurses, and workers in processing and transport equipment operating lost as many as 14 days in 1997, while employees in management and administration, engineering and mathematics, art and recreation, and sales lost 5 days or less.

Finally, employees who were unionized lost almost twice as many workdays for personal reasons than non-unionized employees (10.7 days versus 5.6 days). This is mainly attributed to paid sick leave provisions in most collective agreements.

Because of variations such as those outlined above, absenteeism rates vary widely among employers and, for some, controlling absenteeism can prove to be a major challenge. According to the Conference Board of Canada, 32 percent of employers surveyed considered absenteeism to be a major problem in their organization (Booth 1993).

Impacts

Absenteeism has the potential to cause numerous impacts upon an organization; these include lost productivity, poorer quality of product/service, decreased customer satisfaction, and a negative effect on the performance/morale of other employees. Other operational consequences of absenteeism include greater financial costs to the employer, as well as a greater employee workload. Each of these impacts has the potential to cripple an organization's operational ability, and seriously undermine its efforts to stay competitive or viable.

Absences are especially costly when they are frequent, as employers cannot easily adjust to unanticipated time lost due to absences. When an employee fails to report to work without notice, employers often find themselves without sufficient workforce strength to accom-

plish the work required. This disruption in the flow of everyday operations often results in a decrease in productivity, as either production must be shut down or delayed, or inexperienced or ill-prepared workers are brought in to replace absent workers. One study revealed that absenteeism lowered productivity levels on a national level by 1-2 percent (Booth 1993, 1). In addition to the losses to productivity, Makalachki and Gandz (1982, 4, 5) identified losses in revenue, excess employment costs, such as premiums and benefits, administrative costs and hassle costs as tangible consequences for employers as a result of absenteeism.

Booth (1993) suggests that while absenteeism's impact on productivity, quality, customer satisfaction, and competitiveness is acknowledged, the true financial cost of absenteeism is often underestimated or understated. Based on 1990 absence statistics of a large Canadian telecommunications firm, it is estimated that the costs associated with an absent employee are as high as two and a half times that of the daily wage.³

The Employer Response—Attendance Management Programs

In recognizing that absenteeism is a costly and disruptive problem to any organization, employers have responded in various ways. Some of the responses used to control absenteeism levels include the implementation of incentive or reward programs, sick leave policies, health and safety programs, wellness initiatives, and flexible work arrangements (Booth 1993, 7-10). Other responses include progressive disciplinary programs for culpable absenteeism, and employee assistance programs to deal with substance abuse or other problems that may affect an employee's attendance.

In addition to these responses, an increasingly common approach by employers is the use of attendance management programs. These unilateral plans are designed to monitor the attendance of employees who exhibit less than satisfactory attendance, and provide means of assisting the employee to achieve a level of attendance desired by the employer. Attendance management plans may contain procedures for

- verbal or written warnings,
- the establishment of attendance goals,
- counseling,
- referral to employee assistance programs, or
- referral to a physician or occupational health professional for assessment.

Typically, the final action in an attendance management plan is the termination of the employee, although an employer may choose to transfer the employee to a position where attendance is less critical. This often takes the form of a casual or part-time position.

The attempts by employers to control the level of absenteeism through attendance management programs have not gone unchallenged by unions. In the past decade, there have been a number of reported arbitration cases in which unions have challenged the legitimacy and appropriateness of employer-initiated attendance management plans. Several issues have arisen from the jurisprudence, all of which employers must acknowledge and consider when implementing an attendance management program.

Purpose of this Report

The purpose of this research is to examine the characteristics of attendance management plans, identify the key issues that have arisen as a result of challenges by unions to these plans, and point out why some attendance management programs have been upheld,

³ These calculations were based on Booth's findings of \$38.5 million in total costs, and 127,629 lost productivity days. For the purposes of this paper, the daily wage in Canada was estimated to be \$120.

Issues have arisen that employers must acknowledge and consider when implementing an attendance management program.

while others have been struck down by arbitrators. Based on these findings, some guidelines will be identified, outlining what employers must do to ensure that arbitrators will accept such plans.

A review of the recent cases as reported in *Canadian Labour Arbitration* (Brown and Beatty 1993) will serve as the primary source of information. The focus will be on cases from the 1990s concerning absenteeism and attendance management programs, although several leading reported cases from earlier years will be used in reference to established principles. There is a substantial body of research and literature on the issue of absenteeism, which will be drawn upon as a secondary source of information.

Conclusions will be drawn concerning what employers should avoid in order to legitimately implement an attendance management program. These conclusions will take into account the flexible nature of the arbitration process, as well as those principles that are relatively established in the jurisprudence.

General Arbitration Principles

The jurisprudence over the past few decades has yielded a number of general principles that have guided arbitrators in their decisions on grievances concerning absenteeism. While the arbitral landscape is constantly changing and responding to the social and political climate of the day, there are several principles that are now generally accepted, which will be outlined briefly. These include

- the distinction between culpable and innocent absenteeism,
- the protection of employees with respect to benefits entitlement,
- the protection provided to employees under Human Rights legislation, and
- the prerequisites for establishing unilateral rules at the workplace.

The Introduction of Innocent Absenteeism

In 1969, *Massey-Ferguson Ltd.* introduced the concept of innocent absenteeism, for which an employer may not discipline an employee. This landmark decision recognized that there were circumstances beyond the control of an individual that result in an inability to report to work when scheduled:

The first basic principle is that innocent absenteeism cannot be grounds for discipline, in the sense of punishment for blameworthy conduct. It is obviously unfair to punish someone for conduct which is beyond his control and thus not his fault. (at 371)

As a result, the predominant arbitral perspective of absenteeism as an attitudinal problem began to lose strength, with the recognition that circumstantial events may result in employee absenteeism. The introduction of innocent absenteeism forced employers to treat culpable and innocent absences as different entities, which arise out of different circumstances and have different consequences.

Culpable Absenteeism

As a result of Weiler's decision in *Massey-Ferguson Ltd.*, employers must now distinguish between culpable and innocent absenteeism. Culpable absences are identified as absences for which the employee should be held responsible, as they are within the person's power to prevent or control. One American arbitrator considered the willful refusal of an employee to report to work when scheduled as the ultimate affront to the employment

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relationship (Duff 1985, 61). On the other hand, innocent absences occur through no direct fault of the employee.

Hicks et al. (1995, 5) identified the four key types of culpable absenteeism as lateness or leaving early, failure to notify, absence without leave, and abuse of leave. Employees who are found to have engaged in culpable absenteeism may be subject to disciplinary measures initiated by the employer, which can include verbal or written warning, demotion, suspension or termination. Hicks et al. (1995, 5) also suggest that the discipline for culpable absenteeism must reflect two important elements: the gravity of the offense, and that the discipline may be modified or increased in light of any prior disciplinary record.

Innocent Absenteeism

In contrast to culpable absences, employees cannot be disciplined for absences beyond their control. Common examples of innocent absenteeism include illness, injury, disability, and family responsibilities. Although innocent absenteeism can result in the same inconveniences to employers as culpable absenteeism, the costs associated with innocent absenteeism are different. Generally, individuals absent from work as a result of illness receive compensation from group insurance, sick leave benefits as provided by their collective agreement, or Employment Insurance. On the other hand, those absent from work as a result of accident receive compensation in the form of legislated worker's compensation, disability benefits, or group insurance benefits.

Although the jurisprudence began to recognize that employees cannot be disciplined for absences beyond their control, the unilateral and absolute application of the concept of innocent absenteeism would have forced employers to shoulder the inconveniences and losses, regardless of the extent or severity of an employee's innocent absenteeism. In *Massey-Ferguson Ltd.*, the arbitrator acknowledged this potential problem and commented:

However, arbitrators have agreed that, in certain very serious situations, extreme absenteeism may warrant termination of the employment relationship, thus discharge in a non-punitive sense. Because the relationship is contractual, and the employer should have the right to the performance he is paying for, the employer should have the power to replace an employee on a job, notwithstanding the blamelessness of the latter. If an employee cannot report to work for reasons which are not his fault, he imposes losses on an employer who is also not at fault. To a certain extent, these kinds of losses due to innocent absenteeism must be borne by the employer. However, after a certain stage is reached, the accommodation of the legitimate interests of both employer and employee requires a power of justifiable termination in the former. (at 371)

Building upon this decision, a subsequent reported case, again involving Massey-Ferguson, established a two-fold test with which employers may discharge an employee for innocent absenteeism. In the 1972 case, *Massey-Ferguson Industries Ltd.* the arbitrator indicated that:

I concluded from the cases that in order to justify a discharge the company must establish:

- a) undue absenteeism in the grievor's past record; and
- b) that the grievor is incapable of regular attendance. (at 348)

In determining whether an employee's past record of absenteeism is excessive to the degree that termination is justified, arbitrators often consider a number of factors. These include

A 1972 case established a two-fold test with which employers may discharge an employee for innocent absenteeism

- the nature and duration of the absenteeism,
- the nature of the employee's work,
- the impact his absence has upon the workplace,
- the extent to which the employee's absenteeism is different from that of other employees,
- the treatment of other employees with worse absenteeism records (see *Civil Service Commission*, at 39; *Maritime Beverages Ltd.*, at 44).

Benefits Entitlement

Another arbitral principle that falls within the scope of this discussion is an absent employee's entitlement to benefits. Employees receiving benefits under a disability plan cannot be terminated for innocent absenteeism if the disability plan requires employee status as a necessary condition for continued benefits. This is because the negotiated benefit of disability benefits flows directly from the individual's inability to work. In a recent British Columbia decision, *British Columbia Teachers' Federation*, the arbitrator reaffirmed the rationale for protecting employees who relied on their employee status to receive disability benefits:

It would simply be inconsistent with the existence of such benefits if discharge were permitted on the very grounds that those benefits were provided. (at 225)

In some situations, employers are able to terminate an employee, even if the individual is in receipt of disability benefits. If the disability benefits plan in question simply requires a disabled individual to apply for benefits while having employee status, continued employment is not a requirement and termination is possible for cases of excessive innocent absenteeism (see *Manalta Coal Ltd.*).

Human Rights Legislation and the Duty to Accommodate

The *Ontario Human Rights Code* (R.S.O. 1990, c.H.19) prevents discrimination against employees because of disability or handicap. Inherent in the application of the *Human Rights Code* is the duty of the employer to accommodate the employee to the point of undue hardship, a point that is determined on an analysis of the relevant facts. In *Central Alberta Dairy Pool*, the decision identified (at 521) the possible relevant factors in the assessment of the duty to accommodate as

- financial cost,
- problems of morale among co-workers,
- the interchangeability and flexibility of the workforce and facilities, as well as
- the size of the employer's operation.

Unilateral Rules

Finally, businesses and corporations operate with the intention of remaining competitive, efficient and profitable. The management rights clause of a collective agreement is the vehicle through which employers in unionized environments express these intentions. Based on this right of management, the employer is entitled to initiate measures that allow for the maintenance of efficient, continuous and profitable operations. One such manifestation is the unilateral imposition of an attendance management program designed to control or minimize the incidence of absenteeism. The leading case dealing with the establishment of unilateral rules, *KVP Co.*, outlined (at 85) the six prerequisites for establishing such a rule:

The employer is entitled to initiate measures that allow for the maintenance of efficient, continuous and profitable operations.

- 1 It must not be inconsistent with the collective agreement;
- 2 It must not be unreasonable;
- 3 It must be clear and unequivocal;
- 4 It must be brought to the attention of the employee affected before the company can act on it;
- 5 The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule was used as a foundation for discharge; and
- 6 Such rule should have been consistently enforced by the company from the time it was introduced.

Attendance Management Programs

While it is necessary to look at an entire attendance management program to fully appreciate the nature and complexity of such programs, a discussion of their common characteristics will provide an overview of their basic structure. The main characteristics of attendance management programs that will be discussed include the definition of an absence, the use of a triggering incident, the recognition of improvement in employee attendance, communication between employer and employee, and the multi-step nature of attendance management programs. The discussion in this section relies primarily upon the nine attendance management programs that were in reported arbitration cases from 1990-1998 (see the Appendix for a summary of eight of the programs).

Definitions of Absence within Attendance Management Programs

The basic definition used by programs to identify a single incidence of absence is one continuous or uninterrupted occasion of absence due to illness or sickness (see *Royal Alexandra Hospital* and *Scarborough PUC*). Each incidence of absenteeism by an employee either advances him towards the triggering incident, upon which he is placed in the attendance management program, or if the employee is already in the program, advances him onto the next step within the program. A consequence of this definition is that employees who are mildly ill will advance through an attendance management program quickly. Quite often an employee will miss one day of work and return the next day, only to be absent the following day as the illness returns or increases in severity. In contrast to another employee who is absent for one continuous period of three weeks, the former employee would have incurred two incidents of absence, while the latter incurred only one incidence.

The Triggering Incident

All the attendance management programs reviewed contain a triggering incident, which allows for the accumulation of a specific number of absences before the program is invoked, and the employee is placed in the attendance management program. Attendance management programs generally identify triggering incidents as either

- a specific number of absences or days absent within a period of time, or
- an absenteeism rate or average in excess of the workplace or departmental average within a period of time.

In cases of a specific number of absences or days absent criterion, programs generally use the third or fourth incidence of absenteeism over a 12-month rolling period as the triggering incident (see *Royal Alexandra Hospital*, *Northern Tel*, and *Scarborough PUC*). One program used a shorter set of rolling periods, namely 30-day and 90-day rolling periods within which triggering incidents were identified (see *Champion Road Machinery*).

All the attendance management programs reviewed contain a triggering incident.

Attendance management programs contain a series of steps through which an employee advances.

Recognition of Improvement

In addition to the advancement through an attendance management program for employees who continue to exhibit unacceptable levels of attendance, employees may also regress out of an attendance management program. Removal from an attendance management program, or the regression to a lower step in the program can be accomplished through either a rolling period system (see *Royal Alexandra Hospital, Scarborough PUC, and Dominion Controls Ltd.*), in which earlier periods of poor attendance will be replaced with recent improved attendance, or the attainment of a period of absence-free employment (see *Northern Tel, Perley Hospital, and Prince Edward County Hospital*).

Communication Between Employer and Employee

All of the programs examined for this report incorporated some element of communication between the employer and the employee about the employee's undesirable attendance problem. The most common forms of communication were letters written to the employee, which are also placed on the employee's personnel file (see *Royal Alexandra Hospital, Northern Tel, Perley Hospital, Prince Edward County Hospital, and Oshawa City*), interviews with supervisors or personnel staff, or counseling (see *Royal Alexandra Hospital, Scarborough PUC, Perley Hospital, Prince Edward County Hospital, Champion Road Machinery, and Oshawa City*). It is important that employers effectively communicate the undesirable nature of the employee's absenteeism, as it is an important criterion against which arbitrators assess the justification of any actions taken by employers, especially termination (see *KVP Co.*).

Multi-Step Nature

Finally, attendance management programs contain a series of steps through which an employee advances. This is most likely a result of a two-fold purpose: to allow the employee time within which the attendance problem can be corrected, and to justify any decision to terminate pursuant to an attendance management program.

A multi-step program recognizes that some absenteeism problems take time to correct. Thus, attendance management programs provide defined, clear-cut limits within which the employee may operate, which become increasingly strict and narrow the longer the problem continues. Failure to demonstrate improvement advances the employee to the next step in the program. With the exception of the attendance management program in *St. Michael's Extended Care Centre*, which did not explicitly state the number of steps in its program, attendance management programs contained either 4 or 5 steps. Once the triggering incident is reached and the employee is placed in the program, interviews, counseling, or letters are often the initial actions taken by the employer. The initial responses provide the opportunity for the employer to communicate its dissatisfaction with an employee's poor attendance record, and for employees to make the employer aware of any extraordinary circumstances that might have caused the absenteeism, or any need of assistance the employee may have.

As an employee advances to subsequent steps in the program, increasingly severe responses are invoked by the employer; additional letters or interviews are used to communicate the employer's dissatisfaction with the situation, and to provide opportunities for the employee to communicate additional information to the employer, and the employer may require that the employee submit to a medical assessment. Once all other possible actions are taken, employers may decide to either remove the employee from full-time status, or terminate the employment relationship.

Arbitration Awards

The following analysis is based on all nine cases reported in *Labour Arbitration Cases* from 1990-1998 of grievances relating to attendance management programs. The nine grievances raised issues of reasonableness, inconsistency with the collective agreement, elements of discipline within the attendance management program, and the unfairness of the program's application. Of the nine cases, six were decided in favour of the employer, three were decided in favour of the union.

Awards in favour of the employer were based either on

- the principle that the arbitrator did not have the jurisdiction to infer a term of reasonableness into an attendance management program unless the collective agreement specifically required it to be reasonable (*Royal Alexandra Hospital, Prince Edward County Hospital*),
- the fact that letters issued pursuant to an attendance management program were not disciplinary in nature, but rather vehicles of communication between employer and employee (*Royal Alexandra Hospital, Oshawa City*), or
- the finding that the attendance program was reasonable or applied in an appropriate manner (*Northern Tel, Prince Edward County Hospital, Perley Hospital, Dominion Controls Ltd.*).

In contrast, all of the awards in favour of the union were primarily based on the conclusion that

- the attendance management programs in question failed to uphold a required standard of reasonableness.

Awards in Favour of the Employer

Royal Alexandra Hospital

In *Royal Alexandra Hospital*, the board was asked by the parties to determine three issues: whether letters and verbal advice issued pursuant to the hospital's innocent absenteeism program could be considered disciplinary; whether a requirement that employees see the employer's health service was a violation of the collective agreement; and whether the Board had the jurisdiction (assuming that the letters were not disciplinary) to examine the program for reasonableness. Under the hospital's absenteeism program, an incidence of absenteeism was defined as 'one uninterrupted occasion of absence due to illness' (*Royal Alexandra Hospital*, at 174). Upon the occurrence of the fourth absence within the 12 months beginning April 1st, the employer's supervisor was notified and was required to discuss the employee's absenteeism record with the employee. Unless the discussion revealed a medical condition that would exempt the employee from the program, the employee was then advised that he was being placed in the absenteeism program. The fifth incident of absence resulted in a letter from the personnel director advising the employee of his five incidents of absence, and the employee was given a copy of the absenteeism program, as well as a copy of his absenteeism record. The next incident of absenteeism resulted in another letter from the personnel director, advising the employee that subsequent incidents of absences would result in a detailed assessment of his medical status. Upon the seventh incident, the employee was given a letter, directing him to make an

appointment with the employer's health service department, where an evaluation was made and upon which further action was based. The letter also threatened discipline for non-compliance.

The union argued that the primary purpose of the absenteeism policy was to discourage employees from taking sick leave. The union submitted that there was evidence that employees were changing behaviour and reporting for work even when ill. Counsel for the union relied on the decision in *St. Paul's Hospital*, in which it was held that the attendance management program was disciplinary in nature. The union argued that the main thrust of the policy in the *St. Paul's Hospital* case was similar to the policy in the instant case, and that the conclusions from the arbitrator were transferable to the instant case. The union submitted that the similarities between the two cases were that both policies required mandatory medical information, both employers placed letters written pursuant to the policies in the employee personnel files, and both policies did not make distinctions between culpable and non-culpable absences.

The union also cited the decision in *Metro-Calgary Hospital*, in which the arbitrator concluded that a letter issued pursuant to an attendance management program, advising an employee of an excessive absenteeism record, constituted a disciplinary warning. The arbitrator reasoned that excessive absenteeism, even if non-culpable, represented a form of unsatisfactory performance, which was captured by art. 23.02 in Metro-Calgary Hospital's collective agreement entitled 'Discipline, Dismissal and Resignation', and any letters of such nature must, by definition, be considered disciplinary. As the collective agreement in *Royal Alexandra Hospital* had an article identical to Metro-Calgary's art. 23.02, the union argued that a similar finding should be made.

The board in *Royal Alexandra Hospital* did not agree with the position of the union, but instead agreed with the employer that the basic purpose of the letters issued pursuant to the absenteeism control policy was to communicate to the employee the employer's concern that an absenteeism problem might exist. The board stated:

The fact that such communication might well be seen by the employee receiving the letter as unpleasant news, does not itself make the letter (nor the policy) coercive. (at 189)

The board also found the case distinguishable from *St. Paul's Hospital* in two aspects, and thus the conclusions from the latter case were not applicable to the instant case. First, while the absenteeism policy contained a suspension step, which was characterized as disciplinary, the policy in the instant case did not contain a similar step. Secondly, the arbitrator's conclusion that the absenteeism policy in *St. Paul's Hospital* was disciplinary arose from the fact that the policy intermingled innocent absenteeism due to illness and abuse of sick leave. The board in the instant case found no such intermingling.

Furthermore, in rejecting the arbitrator's decision in *Metro-Calgary Hospital*, the board in *Royal Alexandra Hospital* made the distinction between high levels of absenteeism and unsatisfactory performance:

Unsatisfactory performance in industrial relations and arbitral parlance normally is equated with incompetence—the inability to properly carry out the primary functions of one's job. Excessive absenteeism has little to do with the ability of an individual to actually perform their job duties; it is a different concept that does not easily, in the opinion of this Board, fall within the general category of unsatisfactory performance as that term normally is used. Absenteeism means an individual is unavailable to perform, it does not mean that they are unable to perform.

The board made the distinction between high levels of absenteeism and unsatisfactory performance.

Having established that the policy as a whole in *Royal Alexandra Hospital* was not disciplinary, and that the letters themselves were appropriate as a vehicle of communication, the board nevertheless concluded that the threat of discipline stated in the seventh letter of absenteeism was inappropriate, and that the absenteeism policy should be amended accordingly. In distinguishing the instant case and an earlier case, *Town of Oakville*, the board in the instant case stated:

In coming to these conclusions, the Board is guided by the following reasoning. First, it agrees with the employer that the interview conducted at the health services does not involve a physical examination of any kind and therefore differs substantially from the kind of medical examination considered in *Re Town of Oakville*.

Nevertheless, the Board does not believe that only physical examinations lead to an invasion of privacy. Medical questions of a personal nature might also result in an invasion of privacy. Indeed, the court in *Re Town of Oakville* appeared to recognize that possibility (albeit not forcefully) in its comments regarding ‘a disclosure . . . of personal matters’ (at p. 302). Personal examinations can be disclosed not only through physical examinations, but also through the kinds of questions employees were being asked to answer under the instant health services interview. As such, it is the Board’s belief that an employee should have a choice as to whether or not to undergo such a medically related interview. Threatening to discipline an employee for her refusal to attend such an interview interferes with such choice. (at 195)

Although the board concluded that an employee should not be compelled to attend the medical interview under threat of discipline, it recognized that such a refusal might carry severe negative consequences for the employee. In cases of excessive absenteeism, the board acknowledged that employers have a legitimate interest in ‘ascertaining the likelihood of continued absenteeism problems, the cause of these problems and steps that might be taken to assist the employee in overcoming any causative problems’ (at 196). Thus, if an employee refused to attend the medical assessment interview subsequent to their seventh incident of absenteeism, the employer might not have grounds on which to assume that the absenteeism problem was likely to cease, and that regular attendance could be expected in the future. In the words of the board, ‘refusal to attend may properly be considered as a factor by the employer in coming to its own decisions about an employee’s future attendance prospects’ (at 196). Based on the established arbitral principles of absenteeism, if the prognosis for future attendance of an excessively absent employee is poor, an employer would be justified in terminating the employee.

With respect to whether or not it had the jurisdiction to inquire as to the reasonableness of the employer’s absenteeism program, the board in *Royal Alexandra Hospital* answered in the negative, and cited four reasons for its findings. The first two reasons dealt with the silence of the collective agreement on certain issues. Firstly, the collective agreement was silent on the issue of absenteeism policies. While the board acknowledged that art. 19 of the collective agreement contained provisions on sick leave and payment for sick leave, concepts somewhat related to an absenteeism policy, it concluded that those clauses did not specifically address the issues covered by the employer’s absenteeism policy. As stated by the board, ‘[j]ust because the absenteeism program and art. 19 both talk about absence due to illness does not necessarily mean that they are dealing with the same matter’ (at 198). The second instance of silence identified by the board pertained to the management rights provisions. The board acknowledged that the term ‘reasonable’ or any

If the prognosis for future attendance of an excessively absent employee is poor, an employer would be justified in terminating the employee.

term similar to it did not explicitly modify the management rights clause. As a result, any exercise of management's rights was not held to the standard of reasonableness.

In its third reason, the board referred to the decision in the *KVP Co.* case, which established the principle that if an attendance management program designed to control culpable absenteeism contained disciplinary steps or elements, such a policy would be subject to the implication of a reasonableness test. However in the instant case, the board did not have to decide this issue, as it came to the conclusion that the policy was not disciplinary. The fourth reason relied upon by the board was the two-fold test established in *McKellar General Hospital*. Citing this decision, the board came to the conclusion that there was no evidence to suggest that the implication of the term 'reasonable' into the management rights clause was necessary to give the collective agreement efficacy, or that the employer would have inserted such a term into the existing agreement without hesitation.

Perley Hospital

In the second case decided in favour of the employer, *Perley Hospital*, the union raised a policy grievance, arguing that the hospital's attendance management policy violated provisions of the collective agreement in effect between the parties. The hospital's attendance management policy was a four-step policy that used quarterly attendance statistics to help Department Heads identify employees with either average absence rates or average number of incidents that were higher than the hospital averages. Once employees with unsatisfactory attendance records were identified, the Department Heads reviewed and assessed each individual's circumstances. If the Department Head concluded that the underlying reasons for the employee's absenteeism problem had been resolved and was not expected to recur, no further action was necessary. However, if employees continued to exhibit unsatisfactory attendance subsequent to the initial review and assessment, written notification would be sent to the employee of the employer's desire for improved attendance. The employee might also have been required to submit a doctor's certificate for each and every subsequent absence due to illness. If after the second written notification the employee continued to exhibit unsatisfactory attendance, a comprehensive assessment was performed, with referral to Occupational Health Services, referral for treatment, further monitoring, counseling, training or dismissal as the result.

The union in *Perley Hospital* argued that the policy was subordinate to the collective agreement, which provided a complete code for dealing with sick-leave usage, thereby eliminating the need for a unilateral policy that dealt with the same matter. The union's second argument was that the attendance management policy was arbitrary and discriminatory in its application.

In response to the union's first argument, the arbitrator did not find that the collective agreement provided a complete code that dealt with sick leave. As a result, the hospital was not precluded from unilaterally implementing the attendance management policy. The arbitrator relied on several cases in which arbitrators claimed jurisdiction to review any unilateral policy for reasonableness in its content and application and in the case before him, was unable to conclude that the policy was unreasonable due to an arbitrary and discriminatory application. He relied on Section B of the policy, which outlined the assessment procedure, and how each individual case was assessed based on its own merits, as the basis to refute any presumption of arbitrary and discriminatory application of the program. Having disagreed with the union's two arguments, the policy grievance was dismissed.

The union argued that the policy was subordinate to the collective agreement, which provided a complete code for dealing with sick leave usage.

Northern Tel

The decision in the third case, *Northern Tel*, which was decided in favour of the employer, was based primarily on the appropriate application of its Availability for Work Program (AFWP). The AFWP was also described in another reported case (*Northern Telecom Canada Ltd.*, at 80) as ‘an excellent and thoughtful program.’ The AFWP contained three steps of review followed by a written warning that further absences could result in termination. Each step of review was triggered by either two absences totaling six days or three absences within any 12-month period. At the first step, the employee’s immediate supervisor met with the employee and brought to his attention his attendance record, and the general nature of the attendance management program. The department manager handled the second step, and the final level of review involved the AFWP committee, in which the employee was interviewed by senior management. The employer stressed that at each stage the review was intended to be positive and assistance was offered to the employee to try and overcome any problem. Employees who advanced beyond the third step were given a final letter warning that termination was possible. In the event that the employee accumulated a further two absences totaling six days for three absences within 12 months, the matter was again reviewed before a decision to terminate was made.

While the grievance did not raise any policy issues that directly relate to the focus of this paper, it is useful to note the characteristics of the AFWP that led to its approval by the arbitrator. The AFWP did not invoke automatic responses to specific levels of absenteeism, but instead reviewed each situation on its own merits, and responded in a manner that assisted the employee in correcting the underlying problems, if correctable, that led to the absenteeism. Furthermore, the program was characterized by the arbitrator as rehabilitative in nature, in which employees were provided with numerous counseling opportunities and warnings (at 374).

Prince Edward County Hospital

Another policy grievance was reported in *Prince Edward County Hospital*. The union argued that the new innocent absenteeism policy introduced by the hospital was unfair and unjust in its application, and that the policy conflicted with the collective agreement, with the effect of depriving employees of short-term sick leave benefits. The absenteeism policy reviewed the attendance record of employees for the previous six months, and where the number of incidents of absences was greater than the departmental average, this fact was brought to the attention of the employee, and confirmed by a letter which was given or sent to the employee. Improvement in the employee’s attendance over the six months subsequent to the initial discussion was noted and documented by letter, and the employee was removed from the attendance program. However, failure to demonstrate improvement within three to six months of the initial discussion resulted in a discussion of the continuing problem and another documenting letter. If the employee continued to show no further improvement in two to five months following the second discussion, the employee was interviewed with the Administrator or Assistant Administrator present. At this interview, it was stressed that if there was no improvement in the next two to six months, termination was possible. Should the employee continue to fail to meet the attendance expectations of the hospital, the hospital terminated the employee from the full-time position, but considered a transfer to casual part-time, depending on the particular circumstances.

The arbitrator identified the general approach taken by arbitrators as viewing the collective agreement as a whole if the management rights clause was silent on the obligation of reasonableness on unilaterally proclaimed policies. He cited *McKellar General Hospital*, which identified two conditions that were necessary for an arbitrator to imply a term of reasonableness into a collective agreement:

The Availability for Work Program was characterized by the arbitrator as rehabilitative in nature.

The arbitrator found that there was nothing in the collective agreement that suggested that the innocent absenteeism policy was subject to a test of reasonableness

- 1) if it is necessary to imply a term in order to give 'business or collective agreement efficacy' to the contract, in other words, in order to make the collective agreement work; and
- 2) if, having been made aware of the omission of the term, both parties to the agreement would have agreed without hesitation to its insertion. (at 107)

In the arbitrator's opinion, the two conditions were not met in the case before him, and he found that there was nothing in the collective agreement that suggested that the innocent absenteeism policy was subject to a test of reasonableness. Thus, he concluded that he did not have the jurisdiction to imply a term of reasonableness on the exercise of management's right in the case before him.

The union argued that the innocent absenteeism policy conflicted with sick-leave provisions in the collective agreement because any application of the policy would have been disciplinary in nature or would have led to the termination of an employee. In disagreeing with the union's argument, the arbitrator stated:

However, it is also necessary to realize that at some point in time innocent absences may reach the point where the employer should no longer be required to accommodate the employee's sporadic attendance, and the employee may be considered to be no longer capable of performing his or her part of the employment relationship. When that point is reached, and if the future prospects for improved attendance are not promising, then termination may be appropriate due to the employee's inability to perform his or her contractual duties. (at 47)

The arbitrator also concluded that the absenteeism policy was non-disciplinary in nature, as the policy attempted to avoid terminating employees for innocent absenteeism by providing assistance and advice to them. Using the same reasoning, the innocent absenteeism policy was found not in violation of the collective agreement, and was able to co-exist with the sick-leave provisions in the collective agreement.

Dominion Controls Ltd.

The fifth award that was decided in favour of the employer, ***Dominion Controls Ltd.*** was unlike the other policies discussed above, as it dealt specifically with excessive culpable absenteeism. Under the policy, employees were disciplined based on the number of incidents of culpable absenteeism within a 12-month rolling period. An employee was considered to be excessively absent when his accumulated 12-month total exceeded 15 incidents per year.

The union challenged the policy, arguing that the policy was unreasonable, because it was essentially arbitrary, and failed to take into consideration any mitigating circumstances in individual cases. The union noted that the policy itself did not provide for any discretion, and argued that in discharging an employee without consideration of mitigating circumstances, the employer had limited its own discretion to the extent that its decision was without just cause. The union made reference to a British Columbia decision, ***B.C. Railway***, where the board stated that 'an employer cannot rely on a codified approach to discipline to relieve it of the obligation of establishing just and reasonable cause for the imposition of discipline or dismissal.'

In concluding that the position of the employer in the instant case should prevail, the arbitrator first recognized that the collective agreement made the distinction between discharge and termination. In the management functions clause, the collective agreement

specifically identified one kind of situation that was typically dealt with through the exercise of the power to discharge for cause, and treated it separately. On the other hand, the power to terminate for absenteeism was not subject to a standard of just cause, but rather to the standard of whether or not the absenteeism was excessive. With respect to this issue, the arbitrator concluded that the ‘standard of 15 occurrences per year can be supported such that any absences beyond that limit can be treated as “excessive”’ (see *Prince Edward County Hospital*, at 47). Brandt recognized that certain kinds of absences were not included in the absence count (i.e. absence on approved workers’ compensation claims, sickness and accident claims, jury duty, bereavement leave, union business and authorized leaves of absence), and that the absenteeism policy sought to reduce the level of sporadic and short-term absenteeism, of which the employer had little notice and for which it could not plan. Furthermore, the employer had taken the average absenteeism rate of five incidents per year and tripled it to allow for occurrences that may have been legitimate, which satisfied him that the policy was not unreasonable, nor arbitrary.

Oshawa City

The final case, *Oshawa City*, involved an individual grievance. The issue in the instant case that is relevant to this discussion is whether or not counseling letters issued to the grievor pursuant to the attendance control program were disciplinary in nature. The program identified employees with chronic, excessive or recurrent absenteeism, who were then asked to make a commitment to improve their attendance. Subsequent absences resulted in a further discussion between the employer and employee to determine what steps were being taken by the employee to overcome the problem. If the employee’s absenteeism continued to be unacceptable, the employee was given written counseling. If improvement was not demonstrated subsequent to the written counseling, the employee was interviewed again and given a written warning that termination was pending. Once all the steps in the program had been exhausted, and there was no evidence that regular attendance could be expected in the future, the employee was terminated.

The board in *Oshawa City* did not agree with the union that a counseling letter advising an employee of the employer’s concerns regarding his excessive absenteeism record, and that failure to improve that record might result in discharge, was disciplinary in nature. The board found similarities between the instant case and *Foothills Provincial General Hospital*, in which the grievance focused on the validity of two letters issued to the grievor expressing the employer’s concern over the grievor’s absenteeism record, much of which was attributed to a physical disability caused by a workplace injury. In *Foothills Provincial General Hospital*, the board relied on the decision in *Falconbridge Nickel Mines Ltd.*, which characterized such letters as non-disciplinary in nature and identified the purpose of such letters as establishing the standards to be met in the future, and communicating to the employee the consequences in failing to meet those standards.

Awards in Favour of the Union

Champion Road Machinery

In *Champion Road Machinery*, one of the issues raised by the union was that a vested or negotiated interest as provided for by the collective agreement had priority over a unilateral program implemented by the employer. The collective agreement provided employees, upon sufficiency of proof, the right to sick leave without pay for a period not exceeding two years, as well as weekly indemnity benefits and long-term disability benefits. However, the attendance control program implemented by the employer was deemed to have the effect of destroying those vested interests. As part of the decision, the arbitrator referred to the decision in *De Havilland Aircraft*, which characterized the ability of an employer to termi-

*Counseling letters
are characterized as
non-disciplinary
in nature.*

nate an employee for innocent absenteeism while in receipt of benefits provided for by the collective agreement as the unilateral ability of the employer to destroy an interest vested in the employee under the terms of the collective agreement. This conflict, along with other flaws, led to the attendance control program in *De Havilland Aircraft* being struck.

In the instant case, the arbitrator noted a conflict between the attendance control program and art. 11.07 of the collective agreement. The attendance control program stated that:

All counseling and any action taken will be based on the number of occasions within the previous rolling twenty-four (24) month period. That is, an occasion will become stale and will be dropped from the record if it is more than twenty-four months old.

While art. 11.07 provided that:

When a formerly disciplined employee has accumulated a period of twelve (12) clear calendar months without further warning and without any disciplinary action whatsoever being taken against him, any verbal and written warnings on file for this employee will be considered inactive for future disciplinary matters and may be considered in the event of an Arbitration case solely at the discretion of the Arbitrator or Board of Arbitration.

When the twenty-four month rolling period used by the attendance control program was examined in the context of the collective agreement, the arbitrator concluded that there was an inconsistency between the two. While the collective agreement had established that disciplinary matters would remain on record for twelve months, the attendance control program appeared to increase the length of time disciplinary matters could be kept on record to twenty-four months.

The *Champion Road Machinery* case also provides an insight into the arbitral view of absenteeism management programs that use increasingly threatening letters as part of the program. As part of the attendance control program, employees were given letters after each of the three counseling interviews. Each of the letters outlined the unsatisfactory attendance of the recipient employee, and the request by the employer for regular attendance in the future. The third letter, which constituted the final notice, also communicated to the employee that any further incidents of absenteeism would result in termination.

The arbitrator drew the conclusion that the three letters would be relied upon by the employer to support the termination at the fifth step of the attendance control program, and viewed the employer's position to be that 'if an employee is unable to "correct" his attendance pattern after four occasions, he is terminated' (at 9). He made the distinction between culpable and non-culpable absences, with the former being correctable and the latter generally non-correctable, and concluded that a 'system of "correction" is of questionable merit for non-culpable or blameless absenteeism,' and that the attendance control program therefore inappropriately had disciplinary consequences (at 9). Thus, as suggested by Ish (1995, 260), the evaluation of letters issued pursuant to an attendance management program is based on their purpose and effect; programs that use letters for any other reason than to warn an employee that their attendance was unacceptable are likely to be found disciplinary in nature.

The decision in *Champion Road Machinery* has been considered to be a 'liberal approach' to the issue of implying a term of reasonableness into a collective agreement (Ish 1995, 261). This is a departure from the apparent trend that favoured the application of the twofold *McKellar General Hospital* test, which Ish characterized as 'difficult to apply and [of] doubtful utility' (Ish 1995, 262).

Programs that use letters for any other reason than to warn an employee are likely to be found disciplinary in nature.

In reaching a conclusion as to the reasonableness of the attendance control policy, the arbitrator cited the decision in *Domglas Inc.*, which greatly expanded the context in which the issue of reasonableness could be examined. He relied upon the arbitrator's reasoning in *Domglas Inc.*, which required a unilaterally introduced policy to be reasonable both in content and application. In considering the just cause clause of the collective agreement, he again cited the *Domglas Inc.* decision, and concluded that attendance management programs that depend on an element of chance cannot be regarded as reasonable. This also illustrates the blending of the issues of collective agreement inconsistency and reasonableness, as his decision addressed the two issues simultaneously.

The arbitrator also agreed with the union's argument that the employer's 'no-fault' attendance control policy is governed by the principle that the reason for an employee's absence was irrelevant. Although he acknowledged that the employer had a legitimate interest in controlling excessive absenteeism through the implementation of an attendance management program, he criticized the program as follows:

I am satisfied that the program in question is unreasonable both in content and application. In my view, the program can be characterized as mechanical in nature in its total disregard for the reason for absence, the nature and duration of a claimed illness, the medical history and prognosis of the illness and personal circumstances of individual employees such as seniority and record of service. In particular, the program is unreasonable in that there is no discretion to excuse absences due to legitimate illness or work-related injury. In my view, it is patently unreasonable to implement an absenteeism policy which [*sic*] purports to excuse 'absences due to official road closing' but fails to recognize absences for bona fide illness or injury. (at 11)

Scarborough PUC

Another case decided in favour of the union, *Scarborough PUC*, also did not rely on the principles established in *McKellar General Hospital*. This case is another example of the movement of the jurisprudence away from the vague and ineffective two-fold test from *McKellar General Hospital* and towards a more liberal and comprehensive analysis of the issue of reasonableness.

In this case, the blending of issues, specifically the presence of disciplinary elements and inconsistency with the collective agreement led to the determination that the attendance management policy was unreasonable. The board commented on its view of the relationship between the different issues:

It is apparent from various cases cited by counsel on both sides that, where rules and regulations are considered as having disciplinary consequences, such rules must withstand scrutiny on a test of reasonableness. It is also the case that, in order to be reasonable, such rules and regulations must be seen to be consistent with and not in conflict with any of the terms of the applicable collective agreement. (at 28)

Specific wording in the employer's attendance policy allowed the union in *Scarborough PUC* to succeed in its argument that the policy was disciplinary in nature. As part of the attendance policy, employees who were identified as 'above average absentees' were interviewed, at which time the employee was informed of his absenteeism record, the impact and consequences of the absences, and the employer's expectations of the employee for the subsequent three months after the interview. In addition to the stated purposes of the interviews, the policy specifically stated that the initial interviews were non-disciplinary.

The blending of issues, specifically the presence of disciplinary elements and inconsistency with the collective agreement led to the determination that the attendance management policy was unreasonable.

The union argued that the statement that the initial interviews were non-disciplinary implied that subsequent interviews could lead to discipline. In agreeing with the union's argument, the board accepted the union's line of reasoning that subsequent interviews could be disciplinary if only the initial interviews were identified as non-disciplinary.

The union relied on *Champion Road Machinery* in their submission that the Commission's attendance policy was unreasonable, and also cited the Ontario Court of Appeal's decision in *Metropolitan Toronto*, which upheld the original decision of the board of arbitration that initially had determined that it had the jurisdiction to determine the reasonableness of a unilateral policy on the grounds that the implementation of such policies was governed by the 'reasonable clause' for discipline provision of the collective agreement. In restoring the original decision of the board of arbitration, the Court of Appeal reaffirmed the principle that it was reasonable for a board of arbitration to hold an employer to a test of reasonableness where to do otherwise would create a conflict with or undermine the rights conferred by some other provision of the collective agreement. The union cited *Champion Road Machinery*, in which the board concluded that the employer's attendance control program was unreasonable on the basis of the program's disciplinary consequences and inconsistency with the collective agreement. Furthermore, counsel for the union in *Scarborough PUC* argued that if the findings and decision from *Champion Road Machinery* were applied to the instant case, they would be stronger and more convincing, as unlike the case at hand; the collective agreement in *Champion Road Machinery* did not have a clause similar to cl. (22)(c), in which:

The Commission agrees that any change in the rules and regulations to be observed by the employees, will be discussed with the Union. (at 18)

In its decision, the board in the instant case identified one of the union's main points of contention as the implementation of an attendance policy without discussion or input by the union, as cl. (22)(c) would appear to require. In agreeing with the union, the board reaffirmed the onus on employers to communicate with the union on such matters, if required by terms set out in the collective agreement. In concluding that the commission's attendance policy was both unreasonable and null and void, the board stated:

In the case here, the board's conclusion is that it is not enough for the Commission to have raised the matter in October of 1990 only in broad outline and indicating that there was an intention to introduce an attendance program. For the board to find otherwise, would be to emasculate the meaning of cl. (22)(c). Its obvious purpose is to permit an exchange to occur, for the Commission to propose and the union to respond, and vice versa, and there is no time frame and no defined limit as to how long and how extensive such discussions may be. (at 28)

St. Michael's Extended Care Centre

The decision in *St. Michael's Extended Care Centre* continued the movement away from reliance upon the principles established in *McKellar General Hospital*. In determining that the employer's absenteeism awareness program was unreasonable, the board found that the program was disciplinary in nature.

The board identified three hallmarks of a disciplinary application of rules: failure to distinguish between culpable and non-culpable absenteeism, the use of progressive action

The onus is on employers to communicate with the union on a policy if so required by the collective agreement.

that fails to distinguish between culpable and non-culpable absences, and the failure to take into consideration each individual circumstance of each employee. The union drew upon the jurisprudence, which has established that programs that do not distinguish between the two types of absences and apply progressive steps ultimately resulting in termination may be found to be disciplinary.

In agreeing with the union's position, the board identified the failure of the employer to distinguish between culpable and non-culpable absences as a failure to do so in a sufficiently clear and unequivocal fashion that establishes that treatment of non-culpable illness was non-disciplinary in intent and result. In addition to characterizing the program as disciplinary based on its use of progressive action, the board also criticized the program for its mechanical and rigid application. Instead of considering the individual circumstances of each employee, the program relied solely on the number of incidents of absences that occurred within the previous 12-month rolling period.

The board also identified the mechanical application of the program as a primary indicator of its unreasonableness, specifically targeting the automatic requirements at Levels I, II and V of the program, which required employees to provide medical certificates in order to obtain sick pay (Levels I and II) and required them to submit to a medical examination. While the board acknowledged that there were circumstances in which employers could properly require employees to provide medical certificates or submit to a medical examination, those circumstances were not such that they could be determined on an automatic basis. The board also drew similarities between the case at hand and *Royal Alexandra Hospital*, both of which contained implied threats of discipline in the event an employee refused to submit to a medical examination as part of an attendance management program, and relied on the decision in *Royal Alexandra Hospital* in arriving at its own decision.

Conclusion

The following general conclusions, which are based on the preceding analysis, may prove useful to employers interested in designing and implementing an effective attendance management program.

Avoid Inconsistency with the Governing Collective Agreement

Employers should be careful not to include provisions in an attendance management program that have the effect of altering or modifying terms already contained in the governing collective agreement (see *Scarborough PUC* and *Champion Road Machinery*). In comparison to the other issues discussed below, this problem is easy to avoid—a simple comparison between proposed terms of the attendance management program and the governing collective agreement should highlight any potential inconsistencies between the two.

Avoid Disciplinary Elements for Innocent Absenteeism

Generally speaking, attendance management programs designed to control levels of innocent absenteeism cannot contain elements of discipline. Conversely, programs that have acceptable disciplinary elements must be programs that deal with culpable absenteeism and are subject to a test of reasonableness.

In order to avoid having an attendance management program designed to address innocent absenteeism criticized or struck down by arbitrators as being disciplinary in nature, employers should avoid the following elements in their program:

Be careful not to include provisions in an attendance management program that have the effect of altering or modifying terms already contained in the governing collective agreement.

The concept of reasonableness as applied to attendance management cases is more complex and contentious.

- threats of discipline for non-compliance of directives issued pursuant to an attendance management program (see *Royal Alexandra Hospital*);
- letters which are used for reasons other than to communicate to an employee that their attendance was unacceptable, or to establish standards that the employee must meet (see *Champion Road Machinery* and Ish 1995, 260);
- statements that suggest that initial letters or interviews are non-disciplinary in nature, as arbitrators may conclude that subsequent letters or interviews will be disciplinary (see *Scarborough PUC*);
- any failure to differentiate between culpable and innocent absences, use of progressive action that fails to distinguish between culpable and innocent absences, or failure to take into consideration the individual circumstances of each employee (see *KVP Co.*).

Avoid Unreasonable Elements

In contrast to the previous two issues, the concept of reasonableness as applied to attendance management cases is more complex and contentious, and has been raised in more reported cases. If an attendance management program is subjected to a test of reasonableness, employers should ensure that the following elements are not present in the implementation or application of an attendance management program:

- an implementation of an attendance management program without discussion or input by the union (see *Scarborough PUC*);
- a lack of consideration for the reason of an absence, or the personal circumstances of individual employees (see *Champion Road Machinery* and *St. Michael's Extended Care Centre*);
- failure to distinguish between legitimate illness or work-related injuries and non-legitimate absences (see *Champion Road Machinery*);
- a mechanical application of an attendance management program that does not allow for individual discretion based on individual circumstance, seniority or past record (see *Champion Road Machinery*).

Final Comments

In an effort to control the levels of workplace absenteeism, some employers have responded with the implementation of attendance management programs. Between 1990-1998, there have been nine reported arbitration cases that have dealt with union challenges to these programs. Based on an analysis of these cases, three major issues were found to have been raised: consistency between an attendance management program and the governing collective agreement, the inappropriate use of disciplinary elements, and the unreasonableness of programs. While the first two issues are relatively straightforward, the third issue appears to be in a state of evolution. The departure from the two-fold test as established in *McKellar General Hospital* used to imply a term of reasonableness into a collective agreement has led to a more liberal approach to the issue, and it remains to be seen if this liberal approach will establish itself as the dominant perspective.

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Manalta Coal Ltd.—Manalta Coal Ltd. and Alberta Strip Miners Union (Re) (1986), 20 L.A.C. (3d) 58.

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McKellar General Hospital—McKellar General Hospital and O.N.A. (Re) (1986), 24 L.A.C. (3d) 97.

Metro-Calgary Hospital—Metro-Calgary & Regional General Hospital Dist. No. 93 and U.N.A., Local 121 (Re) (1986), unreported (Fisher).

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Northern Tel—Northern Telecom Canada Ltd. and C.A.W. Local 1915 (Re) (1990), 19 L.A.C. (4th) 362 (Kennedy).

Northern Telecom Canada Ltd.—Northern Telecom Canada Ltd. and C.A.W. Local 27 (Re) (1990), 16 L.A.C. (4th) 71 (Kennedy).

Oshawa City—Oshawa (City) and C.U.P.E. Local 250 (Re) (1996), 56 L.A.C. (4th) 335 (Brandt).

Perley Hospital—Perley Hospital and C.U.P.E. Local 870 (Re) (1990), 10 L.A.C. (4th) 260 (Keller).

Prince Edward County Hospital—Prince Edward County Memorial Hospital and S.E.U. Local 183 (Re) (1991), 20 L.A.C. (4th) 38 (Willes).

Royal Alexandra Hospital—Royal Alexandra Hospital and U.N.A. Local 33 (Re) (1990), 10 L.A.C. (4th) 173 (Ponak).

Scarborough PUC—City of Scarborough Public Utilities Commission and Utility Workers of Canada, Union 1 (Re) (1993), 35 L.A.C. (4th) 1 (Haeffling).

St. Michael's Extended Care Centre—St. Michael's Extended Care Centre and Canadian Health Care Guild (Re) (1994), 40 L.A.C. (4th) 105 (Smith).

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(Ish). *Town of Oakville—Ruelens and Town of Oakville (Re)* (1963), 41 D.L.R. (2d) 294.

Appendix Summary of Attendance Management Programs

Case/Definition of Absenteeism	Triggering Incident/1st Action	2nd Action
<p>Royal Alexandra Hospital</p> <ul style="list-style-type: none"> One uninterrupted occasion of absence due to illness in a 12-month rolling period starting April 1. 	<ul style="list-style-type: none"> 4th incident. Supervisor is notified and talks with employee. 	<ul style="list-style-type: none"> 5th incident. Employee receives letter from personnel director. Employee is given copy of absenteeism policy and his absenteeism record.
<p>Perley Hospital</p>	<ul style="list-style-type: none"> Employee's absences exceed the hospital's average of absences or the average number of incidents of absence exceeds the hospital's average number of incidents. Department Head reviews absence statistics. 	<ul style="list-style-type: none"> Written notification and discussion with supervisor about the problem. Medical certificate may be necessary for any subsequent absences.
<p>Northern Tel</p>	<ul style="list-style-type: none"> 2 absences totaling 6 days or 3 absences totaling 8 days or more in a 1-year period. Level 1—requires 6 months of absence-free attendance for removal from the program. Employee given letter about Level 1 status. 	<ul style="list-style-type: none"> Level 2—requires 8 months of absence-free attendance for removal from the program. Employee given letter about Level 2 status.
<p>Prince Edward County Hospital</p>	<ul style="list-style-type: none"> Number of absences significantly exceeds the departmental average. Discussion with supervisor and letter (put in file). 	<ul style="list-style-type: none"> If improvement in next 6 months, improvement noted in letter and given to employee and filed. If no improvement in 3-6 months, another discussion and letter results (put in file).
<p>Dominion Controls Ltd.</p> <ul style="list-style-type: none"> Recognizes culpable absenteeism only. Any time an employee is absent for any period of time from a scheduled workday. 	<ul style="list-style-type: none"> 12-month rolling average of 15 incidents per 12 months. Verbal counselling. 	<ul style="list-style-type: none"> Written warning.
<p>Champion Road Machinery</p> <ul style="list-style-type: none"> Absence—one full shift or number of consecutive shifts missed. Late—not being at workstation at starting time; leaving early has corresponding meaning. 	<ul style="list-style-type: none"> 2 absences, 3 lates or 1 absence and 2 lates within 30 calendar days. 3 absences, 4 lates, 2 absences and 1 late or 3 lates and 1 absence within 90 calendar days. Verbal counselling with supervisor. 	<ul style="list-style-type: none"> Counselling interview and letter #1.
<p>Scarborough PUC</p> <ul style="list-style-type: none"> Any absence due to illness or sickness. 	<ul style="list-style-type: none"> Number of absences exceeding 4 in a 12-month continuous period or 5 days' absence during the 12-month period. Interview with supervisor; establish objectives for employee to meet over next 3-month period. 	<ul style="list-style-type: none"> 3-month follow up.
<p>Oshawa City</p> <ul style="list-style-type: none"> Paid/unpaid sick time; Worker's Compensation absences; time absent without prior approval. Chronic lateness/time theft not included. 	<ul style="list-style-type: none"> Chronic, excessive or recurrent innocent absenteeism. Employer prepares a record of the employee's absences. Interview with employee; get commitment from employee to make a voluntary effort to improve. 	<ul style="list-style-type: none"> Further discussion to determine what is being done by the employee to overcome the problem.

3rd Action	4th Action	5th Action
<ul style="list-style-type: none"> • 6th incident. • Letter from personnel director warning employee that subsequent incident will result in a detailed assessment of his medical status. 	<ul style="list-style-type: none"> • 7th incident. • Letter directing employee to make appointment to see employer's Health Service department. • Threat of discipline for non-compliance. 	<ul style="list-style-type: none"> • Termination possible after 7th incident.
<ul style="list-style-type: none"> • Second written notification and discussion with supervisor about the problem. • Medical certificate may be necessary for any subsequent absences. 	<ul style="list-style-type: none"> • Comprehensive assessment; possible referral to Occupational Health Services. • Possible referral for treatment, further monitoring counselling, training or dismissal. 	
<ul style="list-style-type: none"> • Level 3—requires 10 months of absence-free attendance for removal from the program. • Employee given letter about Level 3 status. 	<ul style="list-style-type: none"> • Final letter; requires 12 months of absence-free attendance for removal from the program. 	<ul style="list-style-type: none"> • Termination.
<ul style="list-style-type: none"> • If no further improvement in next 2-5 months, employee is interviewed and warned of termination in 2-5 months if no improvement. 	<ul style="list-style-type: none"> • Termination from full-time position • Employer may transfer employee to casual or part-time position. 	
<ul style="list-style-type: none"> • 3 day suspension. 	<ul style="list-style-type: none"> • Discharge. 	
<ul style="list-style-type: none"> • Counselling interview and letter # 2. 	<ul style="list-style-type: none"> • Counselling interview and letter # 3 and final notice. 	<ul style="list-style-type: none"> • Discharge.
<ul style="list-style-type: none"> • 6 month follow up. • Employee directed to employer's doctor for assessment. • New objectives may be set, counselling, job modification or discipline (including discharge). 		
<ul style="list-style-type: none"> • Written counselling. 	<ul style="list-style-type: none"> • Written warning that termination is pending. 	<ul style="list-style-type: none"> • Termination.