



# What's New in HR Law

## Attendance Management Programs Do Not Set the Legal Standard for “Excessive Absenteeism”

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### **BOTTOM LINE**

The definition of “excessive absenteeism” under an Attendance Management Program (“AMP”) may guide, but will not bind, an adjudicator’s consideration of whether an employment contract has been frustrated.

### **Facts: Transit operator dismissed for “chronic” absences exceeding SMP standards**

The grievor worked as a full-time transit operator starting from June 5, 2006. Beginning in January 2010, the grievor began to be “chronically” absent from work for various common or short-term illnesses such as “the flu,” “stomach problems” and “food poisoning.”

Under the employer’s Attendance Management Program (“AMP”), an employee’s absences could be considered “excessive” if the employee had been absent in excess of the applicable standard for at least three consecutive years. The standard was based on the average number of non-culpable absences in the same period for employees in a similar occupational classification. The averages during the relevant period were 3 “incidents” or 13-15 days of absence.

The grievor exceeded the average under the AMP in each of 2010 to 2014 by margins of 31% to 192%. Prior to terminating the grievor's employment in April 2014, the employer had met with and counselled the grievor on 19 occasions regarding his attendance.

### **The Board of Arbitration ordered reinstatement**

The Board of Arbitration (the "Board") found that the employer had inappropriately relied on the grievor's absences related to periods of disability to support the termination. It also found that the grievor's record of absences was otherwise not so excessive as to support termination.

The Board found that, although the grievor might never be able to achieve the AMP standard, given the improvement in his attendance, he could likely achieve reasonable levels of attendance that would not impose any significant hardship on the employer in the future.

### **Judicial Review: Board of Arbitration not bound to accept and apply AMP's standard**

The employer applied to the court for judicial review of the Board's decision.

The Court found that the AMP had significant potential to discriminate against some employees on the basis of "health" and to discriminate against some employees on the basis of age. Specifically, the Court noted that people become more prone to health issues as the body ages. Interestingly, the Court suggested that the AMP should not have created an employee-wide average against which all employees would be measured, as it was reasonable to expect a higher level of attendance for, for example, a healthy 18 year-old than for a 64 year-old employee.

The Court rejected the employer's argument that the board of arbitration had erred in excluding disability-related absences from the grievor's record when considering whether his non-culpable absences were "excessive". The Court found that this approach was consistent with the *Alberta Human Rights Act*.

In dismissing the employer's application, the Court summarized its findings as follows:

1. An AMP that is not part of the collective agreement is not a term or condition of the employee's employment.
2. When disciplinary action is contemplated or taken as a result of non-compliance with an AMP, a grievance arbitrator is not bound to apply the provisions of the AMP, and the grievance arbitrator may consider other factors including those relating to the common law doctrine of frustration of contract.
3. Absences described in an AMP as "excessive" are not necessarily excessive for the purposes of considering whether an employee's attendance record is excessive to the extent necessary to justify dismissal for innocent or non-culpable absenteeism.
4. In considering whether an employee will likely be able to return to reasonable attendance in the future, "reasonable attendance" is not necessarily defined by the provisions of the AMP, and a grievance arbitrator is entitled to consider other relevant factors in considering what

“reasonable attendance” may be for the particular employee performing the particular type of work for that employer.

5. Employees may establish *prima facie* discrimination if they can demonstrate that one of the prohibited grounds of discrimination under the Alberta Human Rights Act was a factor in differential treatment, regardless of when the discrimination occurred.

## Check the Box

AMPs are useful tools in promoting attendance, but this case reminds employers that even a very reasonable AMP that has not been challenged by a union has its limits.

Ultimately, the question is whether an employee’s absences are so routine and significant that the employment contract has been frustrated. Meeting the standard of frustration will be particularly challenging where an adjudicator insists that disability-related absences be excluded from consideration (unless the employer is claiming undue hardship).

When developing or reviewing AMPs, employers:

- must give individualized consideration to an employee’s attendance record prior to terminating employment for non-culpable absenteeism; and
- should ensure that their individualized assessments of attendance take into account the employee’s age, disability, family status or any other relevant factors that may impact attendance.

Citation: *Edmonton (City) v Amalgamated Transit Union, Local No. 569*, 2017 ABQB 59.

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